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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 69

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, PETITIONER,

vs.

DAVID BURNET

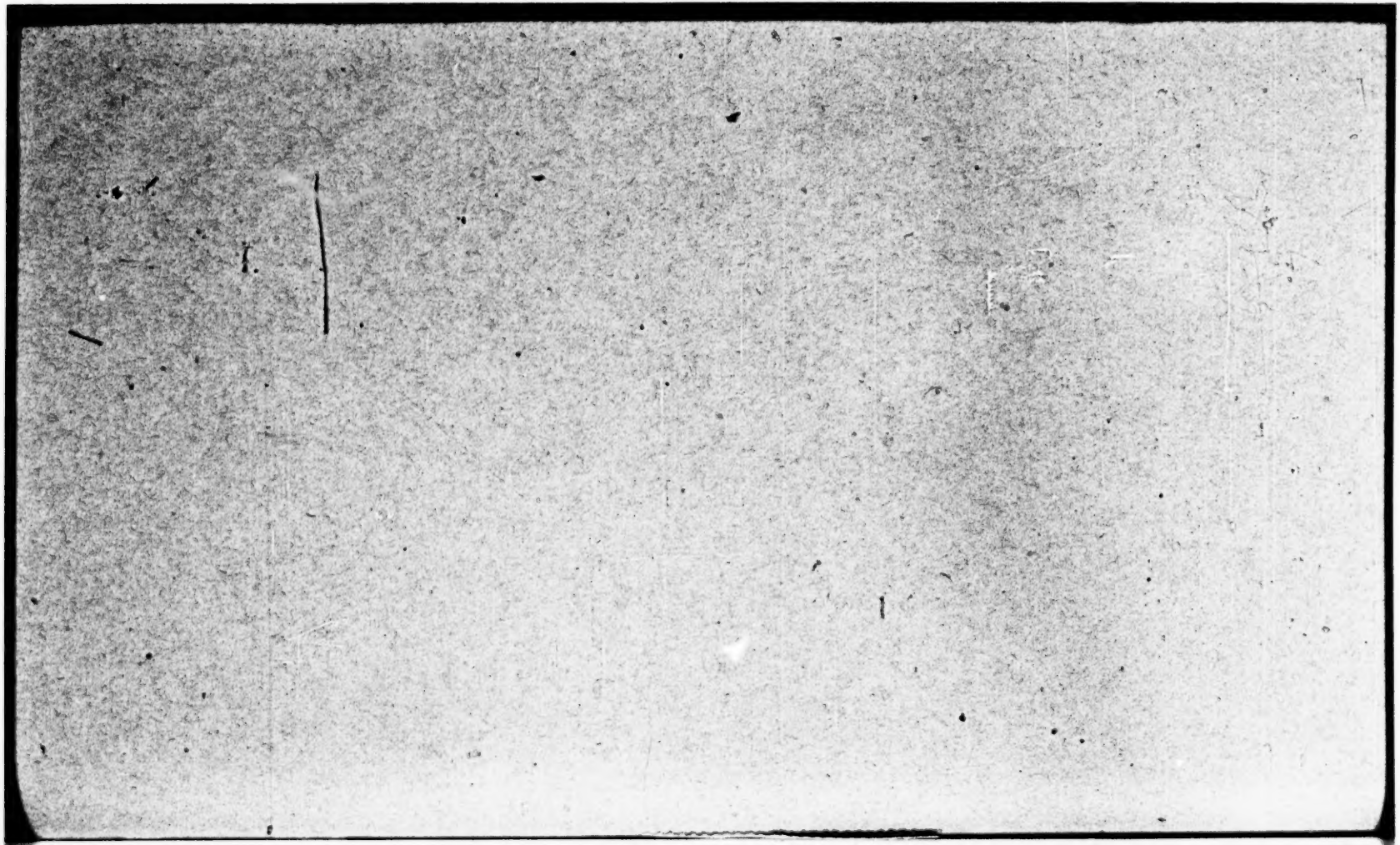
ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 31, 1930

CERTIORARI GRANTED MAY 5, 1930

(34,908)



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INDEX.

	Original	Print
Proceedings in the United States circuit court of appeals, eighth circuit	*a*	1
Caption (omitted in printing)	*c*	
Proceedings before U. S. Board of Tax Appeals	1	1
Order enlarging time	1	1
Docket entries	1	1
Amended petition	3	2
Exhibit A—Notice to Friend M. Aiken of deficiency in tax, October 7, 1926	23	25
Exhibit B—Letter, J. G. Bright to Friend M. Aiken, March 12, 1925	27	28
Exhibit C—Waiver of statutory limitations as to time of making assessments	30	32
Exhibit D—Income and profits-tax waiver by Friend M. Aiken, March 3, 1924	31	33

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 2, 1930

	Original	Print
Exhibit E—Income and profits-tax waiver by Friend M. Aiken, February 5, 1926	32	34
Exhibit F—Income and profits-tax waiver by Friend M. Aiken for the year 1917	33	35
Exhibit G—Income and profits-tax waiver by Friend M. Aiken for the year 1918	34	36
Exhibit H—Income and profits-tax waiver by Friend M. Aiken for the year 1920	35	37
Findings of fact and opinion, Milliken, M	36	38
Order of redetermination	48	50
Petition for review	49	51
Exhibit A—Waiver of statutory limitations as to time of making assessments	57	60
Exhibit B—Income and profits-tax waiver by Friend M. Aiken, March 3, 1924	57	61
Exhibit C—Income and profits-tax waiver by Friend M. Aiken, February 5, 1926	58	61
Exhibit D—Income and profits-tax waiver by Friend M. Aiken for the year 1918	59	62
Exhibit E—Income and profits-tax waiver by Friend M. Aiken for the year 1917	59	63
Exhibits F and G—Excerpt from findings of fact	60	64
Exhibit H—Notice to Friend M. Aiken of deficiency in tax, October 7, 1926	60	64
Exhibit I—Letter, Henry L. Doherty & Company to F. M. Aiken, November 10, 1916	61	65
Notice of appeal	62	66
Stipulation that appeal shall be decided by the United States circuit court of appeals for the eighth circuit	63	67
Praecipe for transcript	64	68
Stipulation that original petition and answer of Commissioner may be omitted from transcript on appeal	65	69
Appearances of counsel (omitted in printing)	67	
Argument and submission (omitted in printing)	69	
Order of revivor	69	70
Opinion, Symes, J	70	71
Decree	79	79
Order substituting Robert H. Lucas as party appellee	79	80
Petition for rehearing (omitted in printing)	81	
Order denying rehearing	90	80
Clerk's certificate	91	81
Order allowing certiorari	92	81

[fols. a-c] [Caption omitted.]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 21513

FRIEND M. AIKEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER ENLARGING TIME TO FILE RECORD UNTIL SEPTEMBER 26, 1928—Filed in U. S. C. C. A. Sept. 22, 1928

For cause appearing of record, it is

Ordered that the time for transmission and delivery of record papers [sur] petition for review of the Board's decision in the above entitled proceeding in the U. S. Circuit Court of Appeals for the Eighth Circuit be and it is hereby extended to September 26, 1928.

(Signed) B. H. Littleton, Member U. S. Board of Tax Appeals.

Dated Washington, D. C., September 12, 1928.

A True Copy. Teste:
B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[File endorsement omitted.]

BEFORE U. S. BOARD OF TAX APPEALS

[Title Omitted]

[fol. 2] Docket Entries

1926.
Nov. 25. Petition received & filed. Taxpayer notified.
" 27. Copy of petition served on G. C.
1927.
Jan. 26. Answer filed by G. C.

Feb. 25. Copy of answer served on taxpayer. Assigned General Calendar.
June 13. Motion to transfer from General to Field Calendar filed by taxpayer.
" 14. Granted. Both sides notified.
Aug. 15. Hearing date set 10-13-27 Tulsa, Okla.
Sept. 22. Motion to amend petition filed by taxpayer Amendment tendered.
" 24. Granted. Both sides notified.
" 27. Copy of motion & amended petition served on G. C.
Oct. 13. Hearing had before Mr. Milliken on merits. Briefs due 12-31-27.
Nov. 2. Transcript of hearing 10-13-27 filed.
Dec. 5. Memorandum filed by G. C.
" 14. Brief filed by taxpayer.
1928.
Feb. 7. Findings of fact & opinion rendered. Mr. Milliken. Judgment will be entered for the respondent.
" 8. Order of dismissal as to 1919 & redetermining deficiency for 1917-1918 and 1920 entered.
July 16. Stipulation of venue filed. 8th circuit.
" 16. Petition for review with assignments of error filed by taxpayer.
" 16. Praecipe filed by taxpayer.
" 19. Proof of service of petition for review filed.
" 19. Proof of service of praecipe filed.

[fol. 3] Now, September 12, 1928, the foregoing docket entries certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal U. S. Board of Tax Appeals, 1924.)

Before United States Board of Tax Appeals

[Title Omitted]

Amended Petition

The above named petitioner, having duly received the permission of the board to amend his petition heretofore filed on November 17, 1926, in this cause, hereby files his Amended Petition, and appeals from the determination of

the Commissioner of Internal Revenue as set forth in his deficiency letter (Symbol IT: PA: PYA 60D-ARM) dated October 7, A. D. 1926, and as the basis of his appeal sets forth the following:

Jurisdiction of Board

(a) The petitioner is a resident citizen of the United States of America, and was, during the years 1917, 1918, 1919 and 1920, engaged in business with principal offices located at Tulsa, State of Oklahoma.

The deficiency letter (a copy of which is hereto attached, marked Exhibit "A") was dated October 7, A. D. 1926, and the same was shortly thereafter mailed to and received by the petitioner.

(b) The taxes in controversy are personal income taxes and relating to the years 1917, 1918, 1919 and 1920, and as provided by the Revenue Acts of 1917 and 1918.

With respect to the said years 1917 and 1918, the following facts obtained, viz:

Under date of March 12, A. D. 1925, the Commissioner of Internal Revenue addressed to the petitioner a jeopardy assessment letter (Symbol IT: PA-2-RO'L-203) in pursuance of Sec. 274 (d) of the Revenue Act of 1924, (copy of [fol. 4] which is hereto attached marked Exhibit "B") and advising that additional taxes had been assessed against the petitioner as follows:

Year 1917

Total Tax Assessable	$104,141.41
Less- Tax Previously assessed	33,400.53
Additional Tax- Year 1917	$70,740.88

Year 1918

Total Tax Assessable	$73,353.02
Less- Tax Previously assessed	43,613.63
Additional Tax- Year 1918	$29,739.39
Total Additional Tax Assessed, Years 1917 and 1918	$100,480.27

Shortly after the said additional tax had been assessed for the said years 1917 and 1918, and to-wit: on March 21,

A. D. 1925, the petitioner filed with the Oklahoma Collector of Internal Revenue claims for abatement of Forms 843, viz:

Year	Amount of claim
1917	$70,740.88
1918	29,736.39
	$100,477.27

The said claims for abatement have heretofore been accepted in part and rejected in part by the Commissioner, and the petitioner has not paid any portion of the said additional assessments for the said years 1917 & 1918, wherefore, on the basis of the said additional assessments and the said deficiency letter dated October 7, A. D. 1926, there is an alleged deficiency, instead of an over-assessment, for the said years 1917 & 1918, viz:

Year 1917

Total Tax Liability per Deficiency letter dated October 7, A. D. 1926	$85,014.62
Less- Tax Previously Assessed (and paid)	33,400.53
Net Additional Tax- Year 1917	$51,614.09

[fol. 5]

Year 1918

Total Tax Liability per Deficiency letter dated Oct. 7, A. D. 1926	$44,599.93
Less- Tax Previously Assessed (and paid)	43,613.63
Net Additional Tax—Year 1918	$986.30

The facts with respect to the said year 1919 are as follows:

Tax Previously Assessed and Paid	$38,161.42
Total Tax Liability per Deficiency letter dated Oct. 7, A. D. 1926	33,041.18
Net Overassessment—Year 1919	$5,120.24

With respect to the said year 1920, there is an alleged deficiency as follows:

Total Tax per Deficiency letter dated Oct. 7, A. D. 1926	$52,780.05
Tax Previously Assessed and paid	23,530.19
Difference- Representing alleged deficiency	$29,249.86

Summary

Wherefore the taxes in controversy are alleged deficiencies, as follows:

Year	Amount
1917	$51,614.09
1918	986.30
1920	29,249.86
Total	$81,850.25

Assignments of Error

(c) The determination of the tax contained in the said deficiency letter is based upon the following errors, to-wit:

1. The Commissioner of Internal Revenue erred in computing net taxable income for the said year 1920 by reason of the fact that he failed to determine the true and correct amount of liquidating dividends from the Admiralty Zinc Company.

[fol. 6] 2. The Commissioner of Internal Revenue erred in computing net taxable income for the said year 1917 by reason of the fact that he failed to determine the true and correct amount of liquidating dividends from the Queen Esther Mining Company.

3. The Commissioner of Internal Revenue erred in computing net taxable income for the said years 1917, 1918 and 1920, by reason of the fact that he failed to determine the true and correct amount of liquidating dividends from the Cushing Gasoline Company.

4. The petitioner did not realize taxable gain in the said year 1917 from the sale of certain shares of stock of the Peerless Refining Company in the sum of $148,513.30.

5. Certain income of the petitioner for the said years 1917, 1918 and 1920 having been derived from the operation

and sale of restricted Indian Lands, may not be taxed by the United States Government.

6. In computing War-Excess Profits Tax income for the said year 1917, the Commissioner failed and refused to allow as a deduction, an adequate salary to the petitioner.

7. The Commissioner was without authority to make Jeopardy Assessment of any War Income or War Excess Profits Taxes for the year 1917 on March 12, 1925, the statute of limitations upon the right so to assess having theretofore expired.

8. The Commissioner was without authority to make Jeopardy Assessment of any Normal Tax or Additional Tax for the year 1917, and sought to be imposed under the Revenue Act of 1916 as Amended by the Revenue Act of 1917, on March 12, 1925, the statute of limitations upon the right so to assess having theretofore expired.

9. The Commissioner now is, and since April 1, 1923, has been without authority to collect any taxes imposed under the Revenue Act of Oct. 3, 1917 for War Income and War Excess Profits Taxes, the statute of limitations for collection having expired on April 1, 1923.

10. The Commissioner now is, and since April 1, 1923, has been, without authority to collect any Normal Tax or Additional Tax for the year 1917, and sought to be imposed under the Revenue Act of Sept. 8, 1916, as amended by the Revenue Act of Oct. 3, 1917, the Statute of Limitations for collection having expired on April 1, 1923.

[fol. 7] 11. The Commissioner now is, and since March 15, 1925, has been without authority to collect any taxes sought to be imposed under the Revenue Act of 1918, the statute of limitations for collection having run and expired on March 15, 1925.

Statement of Facts

(d) The facts upon which the petitioner relies as the basis of this appeal are as follows, viz:

Liquidating Dividends

Admiralty Zinc Company

1. The facts pertaining to liquidating dividends of the said Admiralty Zinc Company for the said years 1918 and 1920. are as follows:

(a) During the said year 1917, the petitioner acquired certain shares of stock of the said Admiralty Zinc Company at a cost of $115,662.00 and held and owned the same throughout the period from April 7, A. D. 1917 to December 31, A. D. 1920 and for some time thereafter.

(b) During the years beginning in the said year 1918 the petitioner received cash distributions from the said Admiralty Zinc Company, in the form of dividends paid out of both the capital and earned surplus of the said company aggregating the following sums:

Year	Amount
1917	None
1918	$36,000.00
1919	34,000.00
1920	48,000.00

(c) An analysis of the earned surplus account of the said Admiralty Zinc Company, and covering the period named follows:

Balance—Dec. 31, 1916	$8,980.21
Net income—Year 1917	55,508.39
Federal Taxes—1917	**10,845.03**
Balance—December 31, 1917	$53,643.57
Add—Net Income, Year 1918	89,859.49
Depletion on Appreciation	101,420.32
Total	$244,923.38
[fol. 8] Deduct:	
Federal Taxes	$51,393.50
Dividends	180,000.00
Total	$231,393.50
Balance—Dec. 31, 1918	$13,529.88

NOTE: Figures in bold face were in red in original copy.

Net Income—Year 1919	$10,653.29
Depletion on Appreciation	30,169.34
Total	$54,352.51
Deduct:	
Federal Taxes	$865.33
Dividends	210,000.00
	$210,865.33
Balance—Dec. 31, 1919 (deficit)	**$156,512.82**
Net Income—Year 1920	214,954.69
Depletion on Appreciation	17,251.08
Total	$75,692.95
Deduct:	
Federal Taxes	$88,614.88
Dividends	300,000.00
	$388,614.88
Balance—Dec. 31, 1920 (deficit)	**$312,921.93**

(d) A computation of the corrected amount of dividends received by the petitioner of the said years, as between dividends paid out of earned surplus and those paid out of the capital of the said Admiralty Zinc Company, follows:

Year 1917

No dividends were received from the said company during the said year 1917.

Earned Surplus as at Dec. 31, 1916	$8,980.21
Add—Net Income, 1917	55,508.39
Total	$64,488.60
Less—Federal Taxes, 1917	10,845.03
Balance, Dec. 31, 1917	$53,643.57
Add—Net Income, 1918	89,859.49
Depletion on Appreciation	101,420.32
Total	$244,923.38

NOTE: Figures in bold face were in red in original copy.

[fol. 9] Less—Federal Taxes, 1918	51,393.50
Balance Available for Dividends	$193,529.88
Dividends Paid, 1918	$180,000.00
Paid out of Surplus	$180,000.00
Paid out of Capital	None
Total	$180,000.00
Dividends received by petitioner, year 1918	$36,000.00
Amount paid out of earned surplus	$36,000.00
Amount paid out of Capital	None
Total Dividends Received by Petition—Year 1918	$36,000.00

Year 1919

Surplus Available for Dividends, 1918	$193,529.88
Less—Dividends, 1918	180,000.00
Balance, Dec. 31, 1918	$13,529.88
Add:	
Net Income, 1919	10,653.29
Depletion on Appreciation	30,169.34
Total	$54,352.51
Less—Federal Taxes 1919	865.33
Balance Available for Dividends	$53,487.18
Dividends Paid in 1919	$210,000.00
Represented by:	
(A) Amount paid out of Surplus	$53,487.18
(B) Amount paid out of Capital	156,512.82
(C) Total	$210,000.00

Percentage of dividends paid out of Surplus (Item (A) divided by Item (C), supra)	25.4700%
Percentage of dividends paid out of Capital (Item (b) divided by Item (c), supra	74.5300
Total	100.0000%
Dividends received by petitioner—year 1919	$34,000.00
Amount paid out of Surplus (25.47% x 34,000.00)	$8,659.80
[fol. 10] Amount paid out of Capital (74.53% x 34,000.00)	25,340.20
Total	$34,000.00

Year 1920

Surplus Available for Dividends—Dec. 31, 1919 (deficit $156,512.82)	None
Net Income—year 1920	$214,954.69
Depletion on Appreciation	17,251.08
Total	$232,205.77
Less—Federal Taxes, 1920	88,614.88
Balance Available for Dividends—year 1920	$143,590.89
Dividends paid in 1920	$300,000.00
Represented by:	
(A) Amount paid out of Surplus	$143,590.89
(B) Amount paid out of Capital	156,409.11
(C) Total	$300,000.00
Percentage of dividends paid out of Surplus (Item (A) divided by Item (C), supra)	47.8636%
Percentage of dividends paid out of Capital (Item (B) divided by Item (C) supra)	52.1364%
Total	100.0000%

Dividends received by petitioner, year 1920	$48,000.00
Amount paid out of Surplus, (47.8636% x 48,000.00)	25,025.47
Total	$48,000.00

(e) The Commissioner of Internal Revenue determined that the petitioner received liquidating and taxable dividends from the said Admiralty Zinc Company for the said years as follows:

Year	Total dividend	Liquidating	Taxable
1918	$36,000.00	$4,258.80	$31,741.20
1919	34,000.00	8,571.40	25,428.60
1920	48,000.00	10,704.00	37,296.00
	$118,000.00	$23,534.20	$94,465.80

[fol. 11] Liquidating Dividends

Queen Esther Mining Company

2. The facts pertaining to liquidating dividends of the said Queen Esther Mining Company for the said year 1917 are as follows:

(a) The petitioner's investment in shares of stock of the said company as at December 31, 1917, was the sum of $20,875.00.

(b) During the said year 1917 the petitioner received cash distributions from the said company in the sum of $4,793.75 the said amount representing dividends paid out of both capital and earned surplus.

(c) An analysis of the earned surplus account of the said company follows:

Balance, Beginning	None
Net Income—Year 1916	$23,420.19
Total	$23,420.19

Less Dividends, 1916	16,000.00
Balance—Dec. 31, 1916	$7,420.19
Less—Net Operating Deficit—Year 1919	$2,249.17
Federal Taxes (1916)	841.16
Dividends 1917	21,500.00
Total	$24,590.33
Balance—Dec. 31, 1917 (deficit)	**$17,170.14**

(d) Computation of the correct amount of dividends received by the petitioner during the said year 1917, as between dividends paid out of surplus and those paid out of Capital of the said Queen Esther Mining Company follows:

Earned Surplus as at Dec. 31, 1916	$7,420.19
Less—Operating Deficit 1917	2249.17
Federal Taxes (1916)	841.16
Total	3090.33
Balance Available for Dividends, year 1917	$4,329.86
Dividends Paid, 1917	$21,500.00

[fol. 12]

Represented by:	
(A) Amount paid out of Surplus	$4,329.86
(B) Amount paid out of Capital	17,170.14
(C) Total	$21,500.00
Percentage of dividends paid out of surplus (Item (A) divided by Item (C) Supra)	20.1389%
Percentage of dividends paid out of Capital (Item (B) divided by Item (C) Supra	79.8611
	100.0000%
Dividends received by petitioner—Year 1917	$4,793.75

NOTE.—Figures in bold face were in red in original copy.

Amount paid out of Surplus (20.1389% x 4,793.75)	$965.41
Amount paid out of Capital (79.8611% x 4,793.75)	3,828.34
Total	$4,793.75

(c) The Commissioner of Internal Revenue determined that the petitioner realized taxable income from dividends, received from the said Queen Esther Mining Company in the said year 1917, in the sum of $4,793.75.

Liquidating Dividends,

Cushing Gasoline Company

3. The facts pertaining to liquidating dividends of the said Cushing Gasoline Company for the said years 1917, 1918, 1919 and 1920, are as follows:

(a) Prior to December 31, A. D. 1916, the petitioner acquired certain shares of stock of the said Cushing Gasoline Company, at a cost of $119,047.61.

(b) During the years beginning in the said year 1917 the petitioner received cash distributions from the said Cushing Gasoline Company in the form of dividends paid out of both the capital and earned surplus of the said company, as follows:

Year	Amount
1917	$52,732.43
1918	72,500.00
1919	60,000.00
1920	20,000.00

[fol. 13] (c) The petitioner states upon information and belief that the following is an analysis of the surplus account of the said Company:

Balance— Dec. 31, 1916 (deficit)	**$102,764.73**
Add—Net Income, Year 1917	281,164.89
Total	$178,400.16

NOTE.—Figures in bold face were in red in original copy.

Less: Federal Taxes Proposed by Treasury Department	$123,882.94
Dividends—1917	145,000.00
Total	$268,882.94
Balance—Dec. 31, 1917 (deficit)	**90,482.78**
Add—Net Income, 1918	225,682.53
Total	$135,199.75
Less: Federal Taxes Proposed by Treasury Department	$96,500.13
Dividends	217,500.00
Total	$314,000.13
Balance—Dec. 31, 1918 (deficit)	**$178,800.38**
Add—Net Income 1919	157,449.87
Total (deficit	**$21,350.51**
Less: Federal Taxes proposed by Treasury Department	$33,524.69
Dividends	180,000.00
Donations	700.00
Total	214,224.69
Balance—Dec. 31, 1919 (deficit)	**$235,575.20**
Add—Net Income, 1920	142,473.40
Total (deficit)	**93,101.80**
Less: Federal Taxes proposed by Treasury Department	$100,217.13
Dividends	60,000.00
Total	160,217.13
Balance—Dec. 31, 1920 (deficit)	**$253,318.93**

(d) A computation of the corrected amount of dividends received by the petitioner for the said years, as between

NOTE: Figures in bold face were in red in original copy.

[fol. 14] dividends paid out of earned surplus and those paid out of capital of the said Cushing Gasoline Company follows:

Year 1917

Earned Surplus as at Dec. 31, 1916 (deficit)..	**102,764.73**
Net Income—Year 1917	281,164.89
Less: Federal Taxes proposed by U. S. Treasury Department	123,882.94
Balance Available for Dividends, 1917	157,281.95
Dividends Paid in 1917	145,000.00
Balance Available for Dividends, 1918	12,281.95
Percent of Dividends paid out of Surplus	100%
" " " " Capital	None
Dividends received by petitioner during year 1917	52,732.43
Amount paid out of earned surplus	52,732.43
Amount paid out of capital	None

Year 1918

Balance—Surplus as at 12-31-1917 supra	$12,281.95
Net Income—year 1918	225,682.53
Total	237,964.48
Less: Federal Taxes Proposed by U. S. Treasury Department	96,500.13
Balance Available for Dividends	$141,464.35
Dividends Paid—1918	217,500.00
Represented by:	
(A) Amount paid out of Surplus	$141,464.35
(B) Amount paid out of Capital	76,035.65
(C) Total	217,500.00

NOTE: Figures in bold face were in red in original copy.

Percentage of dividends paid out of Surplus (Item (A) divided by Item (C) supra)	65.0411%
Percentage of dividends paid out of Capital (Item (B) divided by Item (C) supra	34.9589
Total	100.0000%
Dividends received by petitioner—1918	72,500.00
[fol. 15] Amt. paid out of Surplus (65.0411% x 72,500.00)	47,154.80
Amt. paid out of Capital (34.9589% x 72,500.00	25,345.20
Total	72,500.00

Year 1919

Balance—Surplus 12-31-1918 (debit)	**178,800.38**
Net Income—Year 1919	157.449.87
Less: Federal Taxes proposed by U. S. Treasury Dept.	33,524.69
Donations	700.00
Total	34,224.69
Balance Available for Dividends	123.225.18
Total Dividends Paid—year 1919	180,000.00
Represented by:	
(A) Amount paid out of Surplus	123,225.18
(B) Amount paid out of Capital	56,774.82
(C) Total	180,000.00
Percentage of dividends paid out of Surplus (Item A—divided by Item C, Supra)	68.4584%
Percentage of dividends paid out of Capital Item B—divided by Item C, Supra)	31.5416
Total	100.0000%

NOTE.—Figures in bold face were in red in original copy.

Dividends received by petitioner during year 1919	$60,000
Amount paid out of Surplus, (68.4584 x 60,000.00)	$41,075.04
Amount paid out of Capital, (31.5416% x 60,000.00)	18,924.96
Total	60,000.00

Year 1920

Balance—Surplus, Dec. 31, 1919 (deficit)	**$235,575.20**
Net Income—Year 1920	142,473.40
Less—Federal Taxes proposed by U. S. Treasury Department	100,217.13
[fol. 16] Balance Available for Dividends	42,256.27
Total Dividends paid in year 1920	60,000.00
Represented by:	
(A) Amount paid out of Surplus	$42,256.27
(B) Amount paid out of Capital	17,743.73
(C) Total	$60,000.00
Percentage of dividends paid out of Surplus (Item A—divided by Item C, supra)	70.4271%
Percentage of dividends paid out of Capital (Item B—divided by Item C, supra)	29.5729
Total	100.0000%
Dividends received by petitioner during year 1920	$20,000.00
Amount paid out of Surplus (70.4271 x 20,000.00)	$14,085.42
Amount paid out of Capital (29.5729 x 20,000.00)	5,914.58
Total	20,000.00

NOTE: Figures in bold face were in red in original copy.

(c) The Commissioner of Internal Revenue determined that the petitioner realized taxable and non-taxable income from dividends, received from the said Cushing Gasoline Company, in the said years 1917 to 1920, inclusive, as follows:

Year	Total	Taxable	Non-taxable
1917	52,732.43	52,732.43	None
1918	72,500.00	82,500.00	"
1919	60,000.00	60,000.00	"
1920	20,000.00	60,000.00	"

Sale of Peerless Refining Company Stock

4. The facts pertaining to the sale of certain shares of stock of the Peerless Refining Company are as follows:

(a) During the year 1915 the petitioner acquired certain shares of stock of the said Peerless Refining Company at a cost of $157,736.61. Thereafter the said stock was sold to Henry L. Doherty & Company in pursuance of the terms and provisions of a certain agreement dated Nov. 10, A. D. 1916, the petitioner's proportion of the sale price being the [fol. 17] sum of $306,250.00. Wherefore the petitioner realized gain from this transaction as follows:

Total Sale Price	$306,250.00
Total Cost	157,736.61
Gain	148,513.39

(b) The said contract of Nov. 10, A. D. 1916 provided as follows:

"Henry L. Doherty & Company, Six Wall Street, New York

November 10, 1916.

"F. M. Aiken, New York.

"DEAR MR. AIKEN: This is to confirm the understanding reached with you to-day by which you and your associates give us an option, good until February 1, 1917, upon the entire $300,000.00 of capital stock of the Peerless Refining Company of Oklahoma—for $1,250,000.00.

NOTE: Figures in bold face were in red in original copy.

"In consideration of this option, we hereby tender you our check for $50,000.00. It being understood that in event of our failure to complete the option on Feb. 1, 1917, this payment is forfeited to you.

"In the event that we exercise the option, this amount paid to apply on the purchase price. During the interim between this date and Feb. 1st, all of the earnings of the property to remain with the corporation.

"The financial condition of the property being as set forth in the balance sheet of September, 1916.

Yours truly, Henry L. Doherty & Company, by Frank W. Freuauff."

FWF C

"Accepted: F. M. Aiken."

(c) The petitioner and his associates received in the said year 1916 the said sum of $50,000.00; and in pursuance of [fol. 18] the said contract of Nov. 10, A. D. 1916, the petitioner's proportion thereof was the sum of $12,500.00.

(d) The said $12,500.00 constituted taxable income to the petitioner for the year 1916.

(e) Perforce of the terms and provisions of the said contract of Nov. 10, A. D. 1916, and the agreement and understanding of the parties had during the said year 1916, the sale of the said Peerless Refining Company Stock occurred in the said year 1916.

(f) The Commissioner of Internal Revenue concluded that the petitioner realized taxable income in the said year 1917, in the sum of $148,513.39 and arising from the sale of the said Peerless Refining Company stock.

Exempt Income

Restricted Indian Lands

(5) The facts pertaining to certain income derived from restricted Indian Lands are as follows:

(a) During the said years 1917, 1918 & 1920, the petitioner, as lessee, received certain income from restricted

Indian Lands, the fee-simple titles to which were owned and held by certain members of the Five Civilized Tribes.

(b) The Commissioner of Internal Revenue concluded that all income, which had been received by the petitioner during the said years 1917, 1918 & 1920, and from restricted Indian Lands, constituted taxable income for the said years.

Deductions for Salary Allowance

(6) The facts pertaining to an allowance for salary, in respect of the petitioner's income from trade or business, for the said year 1917, are as follows:

(a) The petitioner's income from his trade or business for the said year, as determined by the Commissioner of Internal Revenue, was the sum of $91,954.90.

(b) The petitioner's average capital invested in his trade or business, as determined by the Commissioner of Internal Revenue, was the sum of $269,286.29.

(c) A reasonable salary in respect of the said income from the petitioner's trade or business is the sum of $50,000.00.

[fol. 19] (d) The Commissioner of Internal Revenue allowed as a deduction from the petitioner's income from his trade or business the sum of $17,500.00.

Jeopardy Assessment of March 12, 1925, of War Income and War Excess Profits Taxes for 1917 Unauthorized, the Statute of Limitations Having Run.

(7) Under T. D. 2650 the authorized date for filing individual income tax returns for the calendar tax year of 1917 was extended to April 1, 1918, and the petitioner herein filed his income tax return for said year on or before that date. Under date of Feb. 7, 1921, and prior to the three year period for assessment of additional taxes, as authorized by the Revenue Act of Sept. 8, 1916, the taxpayer herein executed an "Assessment Only" waiver, unlimited as to date of expiration, but which by Commissioner's Mimeograph 3085 of April 11, 1923, was to expire on April 1, 1924. Said waiver, copy of which is hereto attached,

and made a part hereof, marked Exhibit "C", authorized assessment of additional "Taxes imposed by the Act of Congress, approved Sept. 8, 1916, as amended by Act of Congress approved Oct. 3, 1917", and under Departmental rulings and statutes covered only the Normal 2% Tax imposed by Sec. 1-a Act of Sept. 8, 1916, and the Additional (Surtax) Tax imposed by Sec. 1-b Act of 1916, but did not cover "War Income" or "War Excess Profits" taxes imposed by the Revenue Act of Oct. 3, 1917, as follows:

War Income

a. 2% Normal Tax imposed by Sec. 1, Act of 1917.

b. Additional (Surtax) tax imposed by Sec. 2 Act of 1917.

War Excess Profits

a. Excess profits tax imposed by Sec. 201 Act of 1917.

b. "No Invested Capital" 8% tax imposed by Sec. 209 Act of 1917.

Under Sec. 250-d Act of 1921, the Commissioner was authorized to assess taxes for the year 1917 at any time within five years from the date of the return, that is, at any time prior to April 1, 1923.

On March 3, 1924, the petitioner executed an "assessment and collection" one year waiver for the 1917 taxes, which waiver, the taxpayer herein alleges to have been without consideration and void, but which made a purported written assent to assessment by the Commissioner [fol. 20] during the succeeding year, ending March 3, 1925, as evidenced by Exhibit "D" hereto attached and made a part hereof.

Since said waiver, even though valid, which the petitioner denies, only extended the period for assessment until March 3, 1925, the Jeopardy assessment of March 12, 1925, Exhibit "B" hereto attached, was not made within any period for assessment authorized by statute or by agreement entered into between the petitioner and the Commissioner.

Jeopardy Assessmnet of March 12, 1925, of Normal Tax or Additional (Surtax) for 1917, Sought to be imposed under the Revenue Act of 1916 as Amended by the R. A. of 1917, Was Unauthorized, the Statutes of Limitation Having Theretofore Run.

(8) On Feb. 7, 1921, the petitioner executed an unlimited waiver for the "Taxes imposed by the Act of Congress, approved Sept. 8, 1916, as amended by the Act of Congress approved Oct. 3, 1917". No further waivers of assessment period for the 1917 taxes were executed by the petitioner prior to March 3, 1924, and it is the contention of the taxpayer that a "reasonable" period for the continuance of such waiver was a period of one year and that such waiver expired Feb. 7, 1921, but that the Commissioner, under Sec. 250-d Act of 1921, was given five years from date of return —viz: until April 1, 1923 within which to assess additional taxes for the year 1917. Such period having expired on March 3, 1924, the date of the execution of "Assessment and Collection" waiver, such last waiver was without consideration and void. But even if not void, and even though having full force and effect, authority was by said waiver of March 3, 1924 given to the Commissioner to make assessment prior to March 3, 1925, which period had expired on March 12, 1925, the date of the Jeopardy Assessment of the 1917 Taxes as shown by Exhibit "B" hereto attached and made a part hereof.

Collection of All War Income and War Excess Profit Taxes for 1917 Barred by Statute of Limitations Since April 1, 1923.

(9) Since the waiver executed Feb. 7, 1921, hereto attached as Exhibit "C", did not extend the period for assessment or collection of any War Income or War Excess Profit Taxes under the 1917 Act, assessment and collection of such taxes were by Sec. 250-d Act of 1921 barred after five years from date of return, namely—after April 1, 1923. [fol. 21] The waiver of March 3, 1924, Exhibit "D" hereto attached, and made a part hereof, purported to authorize "assessment and collection" of 1917 taxes for one year from the date of such waiver, viz: until March 3, 1925. Such waiver was without consideration and void, and of no force and effect.

But should this Board hold that such waiver was validly executed and based upon sufficient consideration, no collection of such War Income and War Excess Profits taxes has been at any time since April 1, 1923, authorized for the reason that no assessment was made within the alleged agreed period, viz: between March 3, 1924 and March 3, 1925, the jeopardy assessment herein having been made, as shown by Exhibit "B" hereto attached, on March 12, 1925, nine days subsequent to the authorized assessment period as contended for by the Commissioner.

Further the collection of any taxes under such waiver, even though valid, binding and of full force and effect as contended for by the Commissioner, would be and has been unauthorized since the date of the expiration of the period agreed upon in such waiver for the reason that even though the assessment were made subsequent to the passage of the 1924 Act, it could not by the provisions of Sections 278-d-e of the Act of 1924, authorize collection for six years from date of assessment, for the reason that said March 3, 1924 waiver was executed under Sec. 250-d, Act of 1921, and its terms could not be impaired by later legislation of Congress contrary to the constitutional inhibition against impairment of contracts.

No Normal or Additional (Surtax) Imposed for 1917 Under the Act of 1916 as Amended by the Act of 1917 Could Be Legally Collected After April 1, 1923.

(10) As contended in the Assignment of Error (8) supra, the Commissioner was without authority on March 12, 1925, to make Jeopardy Assessment of the 1917 Normal and Additional (Surtax) Tax imposed by the Act of 1916 as Amended by the Act of 1917. But if it should be held by this Board that such assessment, as applied to such taxes, was valid as of March 12, 1925, the collection thereof after either March 3, 1925 or April 1, 1925 was barred and unauthorized. Said waiver of March 3, 1924 alleged by the Commissioner to authorize assessment and collection for one year subsequent thereto was executed while Sec. 250-d of the Act of 1921 was in force, and was made subject to the provisions thereof. Even assuming that the assessment of such taxes were made within the authorized period, col-
[fol. 22] lection thereof was barred after either March 3,

1925 or April 1, 1925 for Sections 278-c-d-e of the Act of 1924 and 1926 could not give the authority to the Commissioner to collect the tax within six years after assessment. for to do so would be to alter the terms of a written contract entered into by the petitioner and the Commissioner.

No Taxes Imposed by the Act of 1918 Could be Collected After March 15, 1925

(11) Under Sec. 250-d Act of 1921, the period for assessment and collection of 1918 taxes expired five years after the date of petitioner's return, which return was filed by said petitioner on or before March 15, 1919. Assessment and collection of said 1918 taxes were therefore barred by said Sec. 250-d Act of 1921 after March 15, 1924. On March 3, 1924 the petitioner by waiver, marked Exhibit "D" hereto attached, extended the period for "assessment and collection" one year, viz: until March 15, 1925. March 12, 1925 jeopardy assessment was made, as shown by Exhibit "B" hereto attached.

Waiver of March 3, 1925 authorized assessment and collection prior to March 15, 1925, and although assessment was made during the authorized period, such assessment did not, under Sections 278-d-e Act of 1924 extend the period for collection. A waiver executed under Sec. 250-d Act of 1921 could not be governed by the provisions of Sections 278-d-e Act of 1924, for to so apply the law would be an impairment of a contract, prohibited by the Federal constitution.

Wherefore, the petitioner prays that the Board take jurisdiction in relation to each and all of the said years 1917, 1918 and 1920; that it hear and determine this appeal; that it conclude, that for the reasons hereinbefore stated, there is no deficiency in any amounts whatsoever for the said years; that for each of the said years the petitioner has heretofore paid income and profits taxes in excess of that legally due by reason of which such excess should be refunded or credited as provided by law, and that such other relief be granted as is warranted by the law and the facts.

L. E. Cahill, L. E. Cahill, Counsel for Petitioner, 621 Tulsa Trust Bldg., Tulsa, Oklahoma.

[fol. 23] *Duly sworn to by E. F. Blaise. Jurat omitted in printing.*

Exhibit "A" to Amended Petition

Treasury Department, Washington, Oct. 7, 1926. Office of Commissioner of Internal Revenue.

IT:PA:PYA-60D
ARM.

Mr. Friend M. Aiken, Cosden Building, Tulsa, Oklahoma.

Sir: The determination of your income tax liability for the years 1917 to 1920, inclusive, as set forth in office letters of May 27, 1926, has been changed, as a result of your protest dated June 24, 1926, to disclose a deficiency in tax of $29,249.86 for 1920, and over assessments totaling $53,000.12 for 1917, 1918 and 1919. The adjustments made are explained in the attached statement.

[fol. 24] In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of the mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-60D-ARM. In the event that you

acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, (Signed) by C. R. Nash, Assistant to Commissioner.

Inclosures: Statement, Form A, Form 882.

Statement—Mr. Friend M. Aiken

1919

Information on file in this office discloses that the dividends received from the Cushing Gasoline Company were 100% taxable and that those received from the Admiralty Zinc Company were 74.79% taxable and 25.21% non-taxable. Accordingly, $8,571.40 of the dividends received from the latter company were non-taxable.

[fol. 25] The deductions for expenses in Block A total $160,404.62 instead of $158,843.33 as computed by the examining officer. This adjustment shows a loss from business of $84,136.92 instead of $82,575.68 as shown in the report.

Adjustment of your return on this basis discloses a total net income of $118,329.19 on which the correct tax liability is $33,041.18. As a total of $38,161.42 was assessed on your return, there is an over assessment of $5,120.24.

1920

Information on file in this office shows that 23.30%, or $10,704.00 of the dividends received from the Admiralty Zinc Company were nontaxable and the balance taxable.

You are also advised that the dividends paid by the Cushing Gasoline Company were found to be 100% taxable.

Adjustment of your return on this basis discloses a total net income of $154,371.99 on which the correct tax liability is $52,780.05. As $23,530.19 was assessed on your return, there is a deficiency in tax of $29,249.86.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

The overassessments shown herein will be made the subject of certificates of overassessment which will reach you in due course through the office of the Collector of Internal

Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded, since a portion may be an assessment which has been entered but not paid.

The right of appeal as indicated on page one of this letter refers only to any deficiency in tax indicated herein inasmuch as there is no provision in the Revenue Act of 1926 granting the right of appeal against the determination of any overassessment found upon an audit of your return.

[fol. 26] Statement

IT:PA:PYA-60D.
ARM.

In re Mr. Friend M. Aiken, Cosden Building, Tulsa, Oklahoma

Deficiency		Overassessment
1917		$19,126.79
1918		28,753.09
1919		5,120.24
1920	$29,249.86 (Waiver)	
Totals	$29,249.86	$53,000.12

The report of the Internal Revenue Agent in Charge at Oklahoma, Oklahoma, dated March 11, 1926, has been reviewed and approved by this office with the following exceptions:

1917

Information on file in this office shows that 27.79% of the dividends received from the Cushing Gasoline Company were taxable at 1916 rates. As a total of $52,732.43 was received from this source, the amount of $14,654.34 was taxable at 1916 rates, and the balance at the 1917 rates.

Information now avilable also shows that certain dividends totaling $8,400.00, and which are listed in the report, were paid out of 1916 earnings. Therefore, office letter of

May 27, 1926, may be disregarded in so far as this item is concerned.

Adjustment of your return on this basis discloses a total net income of $236,046.36, and a tax liability of $85,014.62. As a total of $104,141.41 has been assessed on your return, there is an overassessment of $19,126.79.

1918

Information on file in this office, based on the final adjustment of the corporation returns, discloses that the dividends received from the Cushing Gasoline Company were 100% taxable, and that those received from the Admiralty Zinc Company were 88.17% taxable and 11.83% nontaxable. Accordingly, the dividends received from the latter company were all taxable except to the amount of $4,258.80. Adjustment of your return on this basis discloses a total net income of $140,557.55, and a tax liability of $44,599.93. [fol. 27] As a total of $73,353.02 was assessed on your return, there is an overassessment of $28,753.09.

Exhibit "B" to Amended Petition

Form XP-3

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:PA-2, RO'L:203.

Treasury Department, Washington

March 12, 1925.

Mr. Friend M. Aiken, Cosden Bldg., Tulsa, Oklahoma.

Sir: In accordance with the provisions of Section 274 (d) of the Revenue Act of 1924, there has been assessed against you an income and profits tax amounting to $100,480.27 for the taxable years 1917 and 1918, the details of which are set forth in the attached statements.

Under the provisions of Section 279 (a) of the Act you have the right to file with the Collector of Internal Revenue, within ten days after notice and demand for payment,

a claim for abatement of this tax or any part thereof. The claim should have attached to it all evidence and data upon which you rely in support thereof, and should be accompanied by a bond not exceeding double the amount of the claim, with such sureties as the Collector deems necessary. When the claim is received by the Collector it will be transmitted to the Commissioner of Internal Revenue, Washington, D. C., who will notify you of the action taken.

Respectfully, J. G. Bright, Deputy Commissioner.

Inclosures: Statements, Form 7862—Aug. 1924.

[fol. 28] Statement

March 12, 1925.

IT:PA-2, RO'L-203

In re Mr. Friend M. Aiken, Cosden Building, Tulsa, Oklahoma

Year	Deficiency in tax	
1917	$70,740.88	Waiver Filed
1918	29,739.39	Waiver Filed
Total	$100,480.27	

Adjustments as recommended in the report of the Internal Revenue Agent in Charge, at Oklahoma, Oklahoma, dated March 17, 1922, have been approved as submitted, except as follows:

1917

Depletion shown in the report in the amount of $7,463.85 has been allowed to the extent of $4,954.71 to agree with information in this office relative thereto. Profit on sale of leases reported by the examining officer in the amount of $96,093.47 has been decreased to $81,244.65. From data on file in this office $157,736.61 has been determined as the value of the assets of the Jane Oil and Gas Company at the time of sale to the Peerless Refining Company in the year 1915. This value has been allowed as the cost of property at the time of sale to the Peerless Refining Company in 1917, which resulted in a reduction in profits as reported on this transaction in the amount of $94,403.28.

Information at hand from the Carpathia Petroleum Company shows distribution of dividends for 1917 in the amount of $16,427.92. Of this amount $698.63 is allocated to 1916 earnings and $15,729.29 to 1917 earnings in their return.

Statement in re Mr. Friend M. Aiken

Block B, Income shown by the books	$131,791.76	
Income as adjusted		$119,452.08
Block C, Income as shown by the books	123,986.13	
Income as adjusted		43,830.50
Block D, Income reported and allowed		3,921.39
Block F, Income as shown by the books	123,986.13	
Income as adjusted		139,715.42
Dividends, 1916		698.63
Block 1, Total income as shown by the books	397,933.06	
Total income as adjusted		307,618.02
[fol. 29] Block L, Excess profits tax		26,161.64
Block M, Balance		$281,456.38
Block N, Deductions		1,325.00
Adjusted net income		$280,131.38
Invested Capital as shown by the books		388,655.17
Invested Capital as adjusted		396,869.13

The adjustment represents the average increase in net income from dividends (½ of $16,427.92)

Excess profits credit	$33,780.84
Excess profits tax	26,161.64

Computation of Tax

Total net income		$280,131.38
Less: Exemption	$2,000.00	
Dividends, Block F (1917)	139,715.42	
" " (1916)	698.63	
		$142,414.05
Income subject to Normal Tax		$137,717.33

Statement in re Mr. Friend M. Aiken

Tax at 2% on $137,717.33	$2,754.35
Tax at 2% on $135,717.33	2,714.35
Surtax on $280,131.38	72,455.18
Surtax at prior year rates on $698.63	55.89
Excess profits tax, Section 201	26,161.64
Total Tax	104,141.41
Tax previously assessed	33,400.53
Additional tax	$70,740.88

1918

Depletion claimed by you in the amount of $9,564.34 is allowable to the extent of $7,232.46. There has been allowed as a deduction $5,000.00 representing loss on the sale of leases, which amount was not taken into consideration by the examining officer.

Net income as disclosed by books		$184,464.19
As corrected		181,796.07
Net decrease		$2,668.12
Additions: Depletion reported in Revenue:		
Agents report	$9,564.34	
Depletion allowed	7,232.46	
Net decrease		2,331.88
Loss on sale of leases not originally reported		5,000.00
Net increase		$2,668.12

[fol. 30] Computation of Tax

Total net income Schedule 1		$181,796.07
Less: Exemption	$2,000.00	
Dividends	127,485.92	
		129,485.92
Income subject to normal tax		$52,310.15

Statement in re Mr. Friend M. Aiken

Tax at 6% on $4,000.00	240.00
Tax at 12% on $48,310.15	5,797.22
Surtax	67,315.80
Total Tax	$73,353.02
Tax previously assessed	43,613.63
Additional Tax	$29,739.39

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Exhibit "C" to Amended Petition

Waiver (Individual)

I, Friend M. Aiken, in consideration of the assurance given me by officials in the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

(Signed) Friend M. Aiken, Taxpayer, by E. F. Blaise, Attorney-in-fact.

Approved

D. H. Blair, Commissioner of Internal Revenue.

Date: Nov. 29, 1922.

[fol. 31] State of Oklahoma,
County of Tulsa, ss:

Subscribed and sworn to before me this 5th day of February, 1921.

Zola Frost, Notary Public. My Commission Expires April 15, 1923. (Seal.)

Exhibit "D" to Amended Petition

IT: NB: F-6 END-44-App.

March 3, 1924. (Date.)

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessment of taxes may be made for the year or years mentioned.

Friend M. Aiken, Taxpayer, by D. H. Blair Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addi-

tion to which, the seal, if any, of the corporation must be affixed.

[fol. 32] EXHIBIT "E" TO AMENDED PETITION

Form 872-A

Treasury Department, Internal Revenue Service

Income and Profits Tax Waiver for Taxable Years Ended Prior to February 1, 1922

February 5, 1926.

In pursuance of the provisions of existing Internal Revenue Laws, Friend M. Aiken, taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919 and 1920, under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision of said Board.

Friend M. Aiken, Taxpayer, by L. E. Cahill, Attorney-in-Fact. D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 33] EXHIBIT "F" TO AMENDED PETITION

Form 872-A

IT: PA: PYA-ARM

Treasury Department, Internal Revenue Service

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922

In pursuance of the provisions of existing Internal Revenue Laws, Mr. Friend M. Aiken, a taxpayer, of 806 Cosden Building, Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision of said Board.

Friend M. Aiken, Taxpayer, by E. F. Blaise, Attorney-in-Fact.

Approved Feb. 17, 1926. D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 34] EXHIBIT "G" TO AMENDED PETITION

Form 872A

IT: PA: PYA-ARM

Treasury Department, Internal Revenue Service

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922

In pursuance of the provisions of existing Internal Revenue Laws, Mr. Friend M. Aiken, a taxpayer of 806 Cosden Building, Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1918 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Friend M. Aiken, Taxpayer, by E. F. Blaise, Attorney-in-Fact.

Approved Feb. 17, 1926. D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 35] EXHIBIT "H" TO AMENDED PETITION

Form 872A

IT:Pa:PYA:ARM

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922

Treasury Department, Internal Revenue Service

In pursuance of the provisions of existing Internal Revenue Laws, Mr. Friend M. Aiken, a taxpayer, of 806 Cosden Building, Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Friend M. Aiken, Taxpayer, by E. F. Blaise, Attorney-in-Fact. D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Now, September 12, 1928, the foregoing amended petition certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal U. S. Board of Tax Appeals. 1924.)

[fol. 36] A true copy. Teste: B. D. Gamble, Clerk U. S. Board of Tax Appeals.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 21513

FRIEND M. AIKEN, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

FINDINGS OF FACT AND OPINION—Promulgated February 7, 1928

(1) Where the Commissioner made a jeopardy assessment in March, 1925, and the taxpayer, within ten days after notice and demand, filed a claim in abatement but did not accompany it with a bond, and where in October, 1926, the Commissioner made his final determination of the deficiency; Held, that the Board has jurisdiction to determine the deficiency although the Commissioner did not in terms refer to the claims in abatement.

(2) Where the Commissioner made a jeopardy assessment in March, 1925, and at a time when both the assessment and collection of the tax were barred by the statute of limitations, and where in February, 1926, the taxpayer and the Commissioner entered into an agreement extending the period within which assessment might be made to December 31, 1926, and where Commissioner finally determined the deficiency in October, 1926, and where an appeal was lodged with the Board within sixty days thereafter; Held, that the assessment and collection of the tax are not barred by the statute of limitations.

(3) Where an option to purchase stock was granted in 1916, and where the option was exercised and the stock sold and delivered in 1917; Held, that the gain from the sale was taxable in 1917.

Claude Collard, C. P. A., M. M. Mahany, Esq., and L. E. Cahill, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

This proceeding involves the redetermination of deficiencies in petitioner's income and profits tax for the year 1917, and in his income taxes for the years 1918, 1919 and

1920. Respondent determined the following deficiencies: for the year 1917, $51,614.09, for the year 1918, $986.30, and for the year 1920, $29,249.86; and for the year 1919 he [fol. 37] determined an overassessment of $5,120.24. Petitioner alleges that respondent committed the following errors:

(1) Error in computing net income for the year 1920 by reason of not determining the true amount of liquidating dividend from the Admiralty Zinc Company.

(2) Error in computing net income for the year 1917 in failing to determine the true amount of liquidating dividends from the Queen Esther Mining Company.

(3) Error in computing net income for the years 1917, 1918 and 1920 in failing to determine the true amount of liquidating dividends from the Cushing Gasoline Company.

(4) Error in determining that taxable gain was realized in the year 1917 from the sale of shares of stock of the Peerless Refining Company.

(5) Error in including in income for the years 1917, 1918 and 1920 income from restricted Indian lands.

(6) Error in refusal to allow as a deduction from gross income for 1917 an adequate salary to petitioner.

(7) Respondent was without authority to make, on March 12, 1925, a jeopardy assessment of any war income or war excess-profits taxes for the year 1917, because such right was then barred by the statute of limitations.

(8) Respondent was without authority to make a jeopardy assessment on March 12, 1925, of any normal tax or additional tax for the year 1917 sought to be imposed under the Revenue Act of 1916, as amended by the Revenue Act of 1917, because such right was then barred by the statute of limitations.

(9) Respondent now is and since April 1, 1923, has been without authority to collect any taxes imposed under the Revenue Act of October 3, 1917, for war income or war excess-profits taxes, such right being barred by the statute of limitations.

(10) Respondent now is and since April 1, 1923, has been without authority to collect any normal or additional tax for the year 1917 sought to be imposed under the Revenue Act of September 8, 1916, as amended by the Revenue Act of October 3, 1917, such right being barred by the statute of limitations.

(11) The respondent now is and since April 28, 1925, has been without authority to collect any taxes sought to be imposed under the Revenue Act of 1918, such right be-[fol. 38] ing barred by the statute of limitations.

Petitioner, at the hearing, waived error (6) and introduced no evidence to sustain errors (1), (2), (3) and (5). This proceeding, in so far as it involves taxes for the year 1919, was dismissed at the hearing. The parties stipulated that the deficiency for the year 1920 was $29,249.86.

Findings of Fact

Petitioner is a resident citizen of the United States, and was, during the years 1917, 1918, 1919 and 1920, engaged in business with his principal offices located at Tulsa, Oklahoma.

Petitioner filed an income and profits-tax return for the year 1917 with the Collector on March 30, 1918. On March 18, 1919, petitioner filed with the Collector a tentative income-tax return for the year 1918, and on April 28, 1919, he filed with the Collector his complete return for said year.

On February 5, 1921, petitioner executed the following instrument in writing:

Waiver (Individual)

I, Friend M. Aiken, in consideration of the assurance given me by officials in the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waive any and

all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

Friend M. Aiken, Taxpayer, (Signed) by E. F. Blaise, Attorney-in-Fact.

The above instrument was filed with respondent on February 7, 1921, and now bears on its face the following notation:

Approved. D. H. Blair, Commissioner of Internal Revenue.

Date: Nov. 29, 1922.

[fol. 39] On March 3, 1924, petitioner executed an instrument in writing, which was thereafter executed by respondent and which reads:

March 3, 1924.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes' approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

(Signed) Friend M. Aiken, Taxpayer, (Signed) by D. H. Blair, Commissioner.

Under date of February 16, 1925, petitioner executed the following instrument in writing and thereafter delivered it to respondent:

February 16, 1925.

Income and Profits Tax Waiver (for Taxable Years Ended Prior to March 1, 1921)

In pursuance of the provisions of existing Internal Revenue Laws, F. M. Aiken, a taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by [fol. 40] registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

F. M. Aiken, Taxpayer, (Signed) by E. F. Blaise, Attorney-in-Fact.

This instrument is stamped on its face "Received Mar. 2, 1925 Service Division." It was not executed by respondent and bears the further notation in writing "not" acceptable."

On February 16, 1925, petitioner executed the following instrument in writing and thereafter delivered it to respondent:

February 16, 1925.

Income and Profits Tax Waiver (for Taxable Years Ended Prior to March 1, 1921)

In pursuance of the provisions of existing Internal Revenue Laws F. M. Aiken, a taxpayer, of Tulsa, Oklahoma,

and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

F. M. Aiken, Taxpayer, (Signed) by E. F. Blaise, Atty.-in-Fact.

[fol. 41] This instrument was not executed by respondent. Stamped on its face is the notation "Received Mar. 2, 1925, Service Division".

On March 12, 1925, respondent made a jeopardy assessment against petitioner covering the calendar year 1917, in the amount of $70,740.88. On the same day respondent made a jeopardy assessment against petitioner covering the calendar year 1918 in the amount of $29,739.39. Within ten days after notice and demand on both the above jeopardy assessments, petitioner filed with the Collector claims in abatement covering both said assessments. The claims were not accompanied by bonds.

On February 5, 1926, petitioner executed an instrument in writing, which was thereafter executed by respondent, and which reads:

Income and Profits Tax Waiver For Taxable Years Ended Prior to Jan. 1, 1922

February 5, 1926.

In pursuance of the provisions of existing Internal Revenue Laws Friend M. Aiken, taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes

due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919 and 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board,

(Signed) Friend M. Aiken, Tax-payer, (Signed) by L. E. Cahill, Atty.-in-Fact. D. H. Blair, Commissioner.

[fol. 42] Subsequently, under date not shown, petitioner executed two instruments in writing similar in all respects to the instrument of February 5, 1926, except that one of them applied only to taxes for the year 1917 and the other to taxes for the year 1918. Each of these instruments was executed by respondent on February 17, 1926.

Under date of October 7, 1926, there was mailed to petitioner from the office of respondent a letter which reads as follows:

October 7, 1926.

IT:PA:PYA-60D.
ARM.

Mr. Friend M. Aiken, Cosden Building, Tulsa, Oklahoma.

SIR: The determination of your income tax liability for the years 1917 to 1920, inclusive, as set forth in office letters of May 27, 1926, has been changed, as a result of your protest dated June 24, 1926, to disclose a deficiency in tax of $29,249.86 for 1920, and overassessments totaling $53,000.12 for 1917, 1918 and 1919. The adjustments made are explained in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redemption of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals,

Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Ap-[fol. 43] peals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PVA-60D-ARM.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, (Signed) D. H. Blair, Commissioner,
by C. R. Nash, Assistant to the Commissioner.

In this letter respondent determined an overassessment for the year 1917 of $19,126.79 and an overassessment for the year 1918 of $28,753.09. These overassessments reduced the jeopardy assessments for the years 1917 and 1918 to the amounts of the deficiencies above shown.

On November 25, 1926, petitioner filed with the Board his appeal from the letter of October 7, 1926.

On November 10, 1916, the petitioner and Henry L. Doherty & Company entered into an agreement, which was evidenced by the following letter:

Henry L. Doherty & Company,
Six Wall Street, New York

November 10, 1916.

F. M. Aiken, New York.

Dear Mr. Aiken: This is to confirm the understanding reached with you today by which you and your associates

give us an option, good until February 1, 1917, upon the entire $300,000 of capital stock of the Peerless Refining Company of Oklahoma for $1,250,000.

In consideration of this option, we hereby tender you our check for $50,000. It being understood that in event of our failure to complete the option on February 1, 1917, this payment is forfeited to you.

In the event that we exercise the option, this amount paid to apply on the purchase price. During the interim between this date and February 1st all of the earnings of the property to remain with the corporation.

[fol. 44] The financial condition of the property being as set forth in the balance sheet of September, 1916.

Yours truly, Henry L. Doherty & Company, by Frank W. Frenauff.

The check for $50,000 referred to in said letter was enclosed therewith. The remainder of the purchase price of $1,200,000 was paid in the year 1917 and the entire capital stock of the Peerless Refining Company was transferred to Henry L. Doherty and Company in the year 1917. Petitioner's gain on said transaction was $148,513.39. Henry L. Doherty & Company were amply able financially to have paid the whole purchase price in the year 1916 if the option had been exercised in that year.

Opinion

MILLIKEN: Three questions are presented for decision. They are: (1) Whether the board has jurisdiction of this proceeding insofar as the taxes for the years 1917 and 1918 are concerned; (2) Whether the assessment and the collection of said taxes are barred by the statute of limitations; and (3) Whether respondent erred in attributing the gain arising from the sale of stock of the Peerless Refining Company to Henry L. Doherty and Company to the year 1917 rather than to the year 1916. These issues will be discussed in the order set forth.

Respondent contends that the board is without jurisdiction for two reasons: First, because no bounds accompanied the claims in abatement and, Second, because respondent did not in his letter of October 7, 1926, reject such claims in whole or in part, but acted on petitioner's protest of June

The Revenue Act of 1926 was enacted on February 26, 1926. Subsequent to that date respondent made his final determination of the taxes and this appeal was filed. In White Oak Gasoline Company vs. Commissioner, 6 B. T. A. 941, we considered at length the effect of the provision of the Revenue Act of 1926 on the jurisdiction of the board, and reached the conclusion that the board had jurisdiction where a jeopardy assessment had been made, a claim in abatement thereof had been filed and the claim rejected in whole or in part, even though no bond accompanied the [fol. 45] claim. The rule laid down in that opinion disposes of respondent's first contention.

At this point, respondent asserts that he did not reject the claim in abatement in whole or in part; that in his final letter he did not even refer to it, and that what he in fact did was to reject in part a protest made by petitioner long after the filing of his claim. This contention leads to the result that the board has or has not jurisdiction in such cases, depending not on what respondent actually does, but on what is stated in respondent's letter of final determination. If petitioner had accompanied his claim in abatement with a bond, we think it could hardly be contended that respondent could oust the board of jurisdiction by merely determining a deficiency, without stating whether he rejected the claim in abatement in whole or in part; but, as already seen, the giving of the bond is not now a jurisdictional fact. The filing of a protest, which probably would have been filed even if a bond had been given, did not obviate the necessity of passing on the merits of the claim in abatement. It was before respondent for consideration, and he could not finally determine a deficiency without in fact denying it in whole or in part. It was what he actually did, and not what he said he did, that conferred jurisdiction. By his act, he denied the claim in part and this, in our opinion, conferred jurisdiction on the board.

Next, petitioner contends that both the assessment and collection of the taxes involved are barred by the statute of limitations. In this connection, he asserts that the waiver of February 5, 1921, extended the time for assessment only and then only as to taxes imposed by the Revenue Act of 1916, as amended by the Revenue Act of 1917, and therefore did not relate to profits taxes imposed by the latter Act; that by such waiver petitioner waived only

rights under the then existing statutes and not rights under any subsequent statute; that the waiver of March 3, 1924, being an entirely new agreement, and containing provisions which were not in the waiver of February 5, 1921, superseded that waiver and therefore the time within which assessment and collection might be made should be computed from March 3, 1924; that such being the case, the jeopardy assessments were made 9 days after such agreed period had expired; that if this is not true, then the period within which collection of the 1918 taxes could be made expired April 28, 1925; that since there were no further agreements extending the time for collection, the collection of [fol. 46] the taxes for both 1917 and 1918 is now barred; and that the agreement of February 5, 1926, and the agreements of February 17, 1926, are not sufficient to extend the time for collection, even if effective for any purpose.

Assuming, but not deciding, that on the date the jeopardy assessments were made, the time within which the taxes could be assessed and collecter had expired, there remains the question, what was the effect on these assessments of the agreements between petitioner and respondent, entered into in February, 1926? In Joy Floral Company vs. Commissioner, 7 B. T. A. 800, we held that Section 1106 (a) of the Revenue Act of 1926 was not retrospective, and, therefore, has not application unless the bar of the statute of limitations was in effect on the date of its enactment, or has arisen subsequently; and that the statute of limitations, as it existed prior to the enactment of that Act, barred only the remedy and did not affect the liability. Applying this rule, we held that although both assessment and collection were barred by the statute, the liability for the tax remained, and that the remedy could be revived by a subsequent agreement, made pursuant to subdivision (a) of Section 278 of the Revenue Act of 1924. This subdivision provided solely for agreements to extend the period within which assessments could be made and contained no provision for an agreement extending the period within which the tax could be collected.

We are of opinion that the rule laid down in Joy Floral Company vs. Commissioner, supra, is applicable here. It is true that in that case no assessment had been made prior to the date of the agreement for the extension of the statutory period, and that in this proceeding, the assessments

had been made nearly a year prior to the date of the agreements. This fact we do not deem material. Although at the date the assessments were made, all remedies were barred, the liability was still in existence. Under these circumstances, petitioner and respondent agreed to "waive the time prescribed by law for making any assessment" and that such period should continue until December 31, 1926, with further provisions relative to notice of deficiency and appeal to the board. It is clear that these agreements would have validated any assessments made after their effective date and prior to the expiration of the agreed period, and we perceive no reason why they did not give equal validity to the assessments which were then in existence. The liability for the taxes remained and they could have been reassessed. This would have been a duplication of what had been done and obviously a work of supererogation. All that [fol. 47] was necessary to revive the remedies was an agreement made pursuant to Section 278 (c). Such an agreement was executed and since the effect of the agreement was to revive the remedies, it follows that the prior assessments, although dormant, were revived and made effective by the agreements.

Petitioner, however, insists that although the agreements entered into in February, 1926, extended the time for assessment (this is all that the then existing statute provided for), the time within which the collection could be made was not affected. This question was also present in Joy Floral Company vs. Commissioner, supra, and decided adversely to petitioner's contentions. The assessments herein involved were made while the Revenue Act of 1924, was in force, and that Act, which is the only Act that can apply, provided in Section 278 (d) that the period within which the assessments could be collected should be six years from the date of the assessment.

We are, therefore, of opinion that neither the assessment nor the collection of these taxes is barred by the statute of limitations.

Respondent's action in attributing the gain arising from the sale of stock of the Peerless Refining Company to Henry L. Doherty & Company to the year 1917 rather than the year 1916 must be approved. The contract of November 10, 1916, was not a contract of sale but merely gave to Henry L.

Doherty & Company an option to purchase, before a specified date, the stock of the Peerless Refining Company. Under that agreement, petitioner had no right to sue Henry L. Doherty & Company for the purchase price until that company had exercised their right to purchase. The agreement did not vest in Henry L. Doherty & Company any title to the stock or any right thereto until the option was finally exercised.

Petitioner in his brief filed in this proceeding, contends that one-fourth of the profit on the contemplated sale contained in the cash payment made for the option in 1916, and which eventually become a part of the purchase price, is taxable in that year. Without passing on the merits of this question, it is sufficient to say that on this point the facts were stipulated, and the stipulation does not show what proportion of the stock of the Peerless Refining Company was owned by petitioner. We only know the total amount of the purchase price and the amount of petitioner's gain. In the absence of this factor, we are unable to determine his interest or the amount of the tax.

[fol. 48] Under these circumstances, the gain arising from the sale is attributable to the year in which the sale was made. That year was 1917. See North Texas Lumber Company vs. Commissioner, 7 B. T. A. 1193.

Reviewed by the Board.

Judgment will be entered for the respondent.

Now, September 12, 1928, the foregoing findings of fact and opinion certified from the record as a true copy,

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal U. S. Board of Tax Appeals, 1924.)

United States Board of Tax Appeals, Washington.

Docket No. 21513.

Friend M. Aiken, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

Order of Redetermination

Pursuant to the Board's findings of fact and opinion, promulgated February 7, 1928, it is

Ordered and decided that, upon redetermination, there is a deficiency for the years 1917, 1918 and 1920 as follows:

1917	$51,614.09
1918	986.30
1920	29,249.86

The proceeding insofar as it relates to the year 1919 is dismissed for lack of jurisdiction.

Enter.

(Signed) John B. Mulliken, Member United States Board of Tax Appeals.

Dated Washington, D. C.,

Entered Feb. 8, 1928.

Now, September 12, 1928, the foregoing order of redetermination certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal U. S. Board of Tax Appeals, 1924.)

[fol. 49] In United States Circuit Court of Appeals for the Eighth Circuit

[Title omitted]

Petition for the Review of Decision of the United States Board of Tax Appeals

To the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Friend M. Aiken in support of this, his petition, filed in pursuance of the provisions of Sec. 1001 of the Revenue Act of 1926, as amended by Section 603 of the R. A. of 1928, for the review of the decision of the U. S. Board of Tax Appeals promulgated Feb. 7, 1928, under Docket #21513, and Order of Redetermination of said Board entered Feb. 8, 1928—approving and finding deficiencies in income and profit taxes for

1917	$51,614.09
1918	986.30
1920	29,249.86

respectfully shows to this Honorable Court as follows:

A. Statement of the Nature of the Controversy

At the trial of this case on October 13, 1927 before the Board of Tax Appeals, the petitioner conceded and the Board found that said Board had no jurisdiction of a certain over-assessment theretofore found by the Commissioner for the year 1919, and the petitioner conceded and the Board found that the deficiency for 1920 was $29,249.86 as alleged by the Commissioner. Therefore, since the years 1919 and 1920 are not in controversy, the petitioner in this Appeal will disregard them.

As to the years 1917 & 1918, as reflected by the "Findings of Fact" and the decision of the Board promulgated in this case, the following facts obtain:

1. (Residence and Business of Petitioner.)—Petitioner was during the years 1917, 1918, 1919 and 1920, and now is a resident citizen of the United States, and during the years 1917 and 1920 inclusive, was engaged in business with his principal offices located in Tulsa, Oklahoma.

[fol. 50] 2. (Returns Filed by Petitioner.)—Petitioner filed an income and profits-tax return for the year 1917 with the Collector at Oklahoma City, Oklahoma, on March 30, 1918. On March 18, 1919, petitioner filed with the Collector a tentative income-tax return for the year 1918, and on April 28, 1919, he filed with the Collector his complete return for said year.

3. (Waivers Filed by Petitioner.)—

(A) On Feb. 5, 1921, as recited in "Findings of Fact" by the Board, executed an instrument in writing called a "Waiver"—copy of which for the convenience of this Court is hereto attached, marked Exhibit "A" and made a part hereof. This waiver was filed with respondent Commissioner on February 7, 1921, and now bears on its face the following notation: "Approved D. H. Blair, Commissioner of Internal Revenue, date Nov. 29, 1922".

(B) On March 3, 1924, the petitioner executed another "Waiver", which was thereafter executed by the respon-

dent Commissioner. A copy of said waiver is likewise found in the "Findings of Fact" of the Board decision, and copy of same is hereto attached, marked Exhibit "B", and made a part hereof.

(C) On February 5, 1926, petitioner executed an instrument in writing, called a "Waiver," which was thereafter executed by respondent, copy of which "Waiver" is included in the "Findings of Fact" of the Board Decision, and copy of which is hereto attached as Exhibit "C" and made a part hereof.

(D) Under date of Feb. 16, 1925, petitioner executed another "Waiver", incorporated in the Board's "Findings of Fact", a copy of which is hereto attached as Exhibit "D" and made a part hereof for the convenience of this Court. This instrument is stamped on its face "Received Mar. 2, 1925 Service Division". It was not executed by respondent and bears the further notation in writing "Not Acceptable".

(E) On Feb. 16, 1925, petitioner executed another instrument called a "Waiver" which was thereafter delivered to respondent; a copy of which is hereto attached as Exhibit "E" and made a part hereof, and which is likewise included in the "Findings of Fact" of the Board decision. This instrument was Not executed by respondent. Stamped on its face is the notation "Received Mar. 2, 1925, Service Division."

[fol. 51] (F-G) Subsequently, under date not shown, petitioner executed two instruments in writing similar in all respects to the instrument of Feb. 5, 1926, except that one of them applied only to taxes for the year 1917 and the other to taxes for the year 1918. Each of these instruments was executed by respondent on Feb. 17, 1926.

4. (Jeopardy Assessment.)—On March 12, 1925, respondent Commissioner made a Jeopardy Assessment against petitioner covering the calendar year 1917, in the amount of $70,740.88. On the same day respondent made a Jeopardy Assessment against petitioner covering the calendar year 1918 in the amount of $29,739.39. Within ten days after notice and demand on both the above jeopardy assessments, petitioner filed with the Collector claims

in abatement covering both said a sessments. The claims were not accompanied by bonds.

5. (Letter of October 7, 1926.)—Under date of Oct. 7, 1926 there was mailed to petitioner from the office of respondent a letter, copy of the material part is included in "Findings of Fact" of the Board of decision, and which for the convenience of this Court is hereto attached, marked Exhibit "H"—and made a part hereof.

In this letter respondent determined an overassessment for the year 1917 of $19,126.79; and overassessment for the year 1918 of $28,753.09—thus determining the following:

1917

Jeopard Assessment of Mar. 12, 1925	$70,740.88
Less overassessment as per letter of Oct. 7, 1926 (Ex. I)	19,126.79
Deficiency (as found by Board)	$51,614.09

1918

Jeopardy Assessment of Mar. 12, 1925	$29,739.39
Less overassessment as per letter of Oct. 7, 1926 (Ex. I)	28,753.09
Deficiency (as found by Board)	$986.30

6. (Sale of Stock.)—On November 10, 1916, the petitioner and Henry L. Doherty & Company, entered into an agreement, evidenced by a letter of that date, copy of which is incorporated in the "Findings of Fact" of the Board, and a copy of which is hereto attached as Exhibit [fol. 52] "I" and made a part hereof. The check for $50,000.00 referred to in said letter was enclosed therewith. The remainder of the purchase price of $1,200,000.00 was paid in the year 1917 and the entire capital stock of the Peerless Refining Company was transferred to Henry L. Doherty & Company in the year 1917. Petitioner's gain on said transaction was $148,513.39. Henry L. Doherty & Company were amply able financially to have paid the

whole purchase price in the year 1916 if the option had been exercised in that year.

The Commissioner concluded that the gain of $148,513.39 was taxable income to the petitioner for the year 1917, whereas the petitioner maintained in his petition and at the trial of the case that said sum was income for the year 1916. Said sum of $148,513.39 was included by the Commissioner in the year 1917 in his computation of the taxable income of and tax resulting to petitioner for said year.

7. (Appeal to the Board.)—On November 25, 1926, the petitioner filed with the Board of Tax Appeals under Docket #21513, in pursuance of the provisions of the Revenue Act of 1926, his petition, and on Sept. 24, 1927, following leave granted by the Board, his amended petition, requesting a hearing before such Board—setting up the facts in substance as above recited, and praying that the Board, among other things not now material, should find that:

a. The statute of limitations upon assessment and collection of taxes for the year 1917 expired not later than March 3, 1925, and therefore the Commissioner was without authority to make Jeopardy Assessment on March 12, 1925 or to collect any taxes for the year 1917 after March 3, 1925.

b. The Statute of Limitations upon Assessment and Collection of taxes for the year 1918 expired on April 28, 1925 and although assessment was made March 12, 1925 the period authorized for collection expired April 28, 1925, for the reason that the one year waiver executed March 3, 1924 was executed under the 1921 Act, which Act did not authorize Six years collection period where assessment was made within the agreed period.

c. Profit from sale of the Peerless Refining Company stock was properly chargeable as income against this petitioner only for the year 1916, and not for the year 1917 as had been determined by the Commissioner.

[fol. 53] 8. (Proceedings Subsequent to Filing Petition and Prior to Trial Before the Board.)

Thereafter on February 25, 1927, the respondent Commissioner filed with the said Board his answer to the said petition, which answer admitted the averments of the petition regarding Jeopardy Assessment, Claims in Abatement, the letter of Oct. 7, 1926, etc., and "the averments of action taken by the respondent in the several issues stated; but denied the errors alleged by petitioner in said petition".

9. (Trial by and Decision of the Board.)

The cause, being at issue under the rules of practice of said Board upon the filing of such answer, and same having been by said Board placed upon its Circuit Calendar for hearing at Tulsa, Oklahoma, duly came on for hearing on Oct. 13, 1927—at which time the petitioner by competent witnesses submitted testimony in support of the allegations aforesaid. Thereafter on Feb. 7, 1928 the said Board rendered its findings of fact in substantial accordance with the facts as alleged in the petition and as hereinbefore set forth, together with an opinion and decision in which it was held, in part, as follows:

(1) Where the Commissioner made a jeopardy assessment in March, 1925, and the taxpayer, within 10 days after notice and demand, filed a claim in abatement but did not accompany it with a bond, and where in October, 1926, the Commissioner made his final determination of the deficiency; Held, that the Board has jurisdiction to determine the deficiency although the Commissioner did not in terms refer to the claim in abatement.

(2) Where the Commissioner made a jeopardy assessment in March, 1925, and at a time when both the assessment and collection of the tax were barred by the statute of limitations, and where in February, 1926, the taxpayer and the Commissioner entered into an agreement extending the period within which assessment might be made to December 31, 1926, and where the Commissioner finally determined the deficiency in October, 1926, and where an appeal was lodged with the Board within 60 days thereafter; Held, that the assessment and collection of the tax are not barred by the statute of limitations.

(3) Where an option to purchase stock was granted in 1916, and where the option was exercised and the stock sold and delivered in 1917; Held, that the gain from the sale was taxable in 1917.

[fol. 54] On February 8, 1928, the said Board entered its final order of redetermination approving the deficiency as determined by the respondent for the years and sums as follows:

1917	$51,614.09
1918	986.30

No bond to stay the collection of the deficiency as determined or of any deficiency heretofore determined by the said respondent has ever been filed by the petitioner.

B. Designation of Court of Review.

The petitioner, being aggrieved by the said opinion, decision and order, and being authorized under Sec. 1002-d of the Revenue Act of 1926, as supported by stipulation agreement between the Commissioner and petitioner hereto attached, and made a part hereof, desires a review thereof in accordance with the provisions of the R. A. of 1926 and 1928, by the U. S. Circuit Court of Appeals for the 8th Circuit, within which circuit is located the office of the Collector of Internal Revenue to whom the said petitioner made his income and profits tax returns.

C. Assignment of Errors.

The petitioner, as a basis for review and reversal of the Board's decision, specifies the following errors:

1. The Board of Tax Appeals erred in its failure to hold that on March 12, 1925, the Commissioner was without authority to make any Assessment of any Income, War Income, or War Excess Profits taxes for the year 1917, the statute of limitations upon the right so to Assess having expired on or before March 3, 1925, preceding.

NOTE.—The Board in the body of its opinion assumed but did not decide that the statute of limitations had run

as of March 12, 1925, the date of the Jeopardy Assessment —and in Syllabus #2 of its decision the Board so held.

2. The Board of Tax Appeals erred in its failure to hold that on or before March 3, 1925, the Statute of Limitations upon Collection of 1917 taxes expired and that the Commissioner was without authority to Collect any taxes for said year thereafter.

NOTE.—The Board in the body of its opinion assumed but did not decide that the Statute of Limitations upon collection of the 1917 taxes had expired as of March 12, 1925, In Syllabus #2 of its decision the Board assumed the statute had run.

[fol. 55] 3. The Board of Tax Appeals erred in holding that, the Statute of Limitations against assessment, and collection of the 1917 taxes having expired not later than March 3, 1925 the instrument in writing dated Feb. 5, 1926 could revive the statute and authorize the Commissioner to make another assessment of taxes for the year 1917.

4. The Board of Tax Appeals erred in failing to hold that even though by the instrument of Feb. 5, 1926, or any other instrument executed during February 1926, the Statutory period for assessment was revised, the Commissioner was not required to make an assessment on or before May 4, 1928, of said 1917 taxes.

5. The Board of Tax Appeals erred in holding that where the Statute of Limitations against assessment and collection of the 1917 taxes had expired not later than March 3, 1925, the instrument in writing dated February 5, 1926, or any other instrument executed, could revive or did revive the null and void Jeopardy Assessment of March 12, 1925 and make such Assessment valid and binding.

6. The Board of Tax Appeals erred in holding that where the Jeopardy Assessment of March 12, 1925 was made after the statutory period for assessment and collection had expired, and where the Commissioner, pursuant to the Instrument in Writing dated Feb. 5, 1926, determined or attempted to determine thereafter the taxes for the year 1917, that the

Commissioner was as of Feb. 7, 1928, or at any date subsequent to March 3, 1925 authorized to collect said taxes.

7. The Board of Tax Appeals erred in its failure to hold that the Commissioner now is, and since April 28, 1925 has been without authority to collect any taxes sought to be imposed for the year 1918, the statute of limitations for collection having run and expired on April 28, 1925.

8. The Board of Tax Appeals erred in holding that where the Statute of Limitations against Assessment and Collection of the 1918 taxes had expired not later than April 28, 1925, the instrument in writing dated Feb. 5, 1926 could revive the statute and authorize the Commissioner to make another assessment of taxes for the year 1918.

9. The Board of Tax Apeals erred in failing to hold that even though by the instrument of February 5, 1926 the statutory period for assessment of the 1918 taxes was revived, the Commissioner was not required to make an assessment on or before May 4, 1928 of said 1918 taxes.

[fol. 56] 10. The Board of Tax Appeals erred in holding that where the period for Collection of the Jeopardy Assessment of March 12, 1925 expired April 28, 1925 as to the 1918 taxes, and where the Commissioner, pursuant to the instrument dated Feb. 5, 1926 determined or attempted to determine thereafter the taxes for the year 1918, that the Commissioner was as of Feb. 7, 1928, or at any date subsequent to April 28, 1925 authorized to collect said taxes.

11. The Board of Tax Appeals erred in holding that under a certain contract of sale dated Nov. 10, 1916 for the sale and delivery of certain stock owned in part by petitioner, and which stock was delivered and paid for during the year 1917, the gain from the sale was taxable in the year 1917.

Wherefore your petitioner prays that this Honorable Court may review said findings, decision, opinion, and order and reverse and set aside the same and that the Clerk of the said United States Board of Tax Appeals be directed to transmit and deliver to the Clerk of said Court certified copies of all and every one of the documents necessary and material to the presentation and consideration of the fore-

going petition for review and as required by the rules of said Court and statutes made and provided.

And your petitioner will ever pray.

Friend M. Aiken, by L. E. Cahill, Attorney-in-Fact.
L. E. Cahill, Attorney for the Petitioner, 621 Tulsa Trust Building, Tulsa, Oklahoma.

Duly sworn to by L. E. Cahill. Jurat omitted in printing.

[fol. 57] EXHIBIT "A" TO PETITION FOR REVIEW WAIVER (INDIVIDUAL)

I, Friend M. Aiken, in consideration of the assurance given me by officials in the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

Friend M. Aiken, Taxpayer, (Signed) by E. F. Blaise, Attorney-in-fact.

The above instrument was filed with respondent on February 7, 1921, and now bears on its face the following notation:

Approved. D. H. Blair, Commissioner of Internal Revenue. Date: Nov. 29, 1922.

EXHIBIT "B" TO PETITION FOR REVIEW

March 3, 1924.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and col-
[fol. 58] lection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes' approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

(Signed) Friend M. Aiken, Taxpayer, (Signed) by D. H. Blair, Commissioner.

EXHIBIT "C" TO PETITION FOR REVIEW

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922

February 5, 1926.

In pursuance of the provisions of existing Internal Revenue Laws Friend M. Aiken, taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919 and 1920 under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of [fol. 59] days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Signed) Friend M. Aiken, Taxpayer, by L. E. Cahill, Attorney-in-fact. (Signed) D. H. Blair, Commissioner.

EXHIBIT "D" TO PETITION FOR REVIEW

February 16, 1925.

Income and Profits Tax Waiver (for Taxable Years Ended Prior to March 1, 1921)

In pursuance of the provisions of existing Internal Revenue Laws F. M. Aiken, a taxpayer, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Signed) F. M. Aiken, Taxpayer, by E. F. Blaise, Attorney-in-Fact.

This instrument was not executed by respondent. Stamped on its face is the notation "Received March 2, 1925, Service Division."

EXHIBIT "E" TO PETITION FOR REVIEW

February 16, 1925.

Income and Profits Tax Waiver (for Taxable Years Ended Prior to March 1, 1921)

In pursuance of the provisions of existing Internal Revenue laws, F. M. Aiken, a taxpayer of Tulsa, Oklahoma, and [fol. 60] the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

(Signed) F. M. Aiken, Taxpayer, by E. F. Blaise, Attorney-in-Fact.

This instrument is stamped on its face "Received March 2, 1925, Service Division." It was not executed by respondent and bears the further notation in writing "not acceptable."

EXHIBITS "F" & "G" TO PETITION FOR REVIEW

Excerpt from Board's Findings of Fact

"Subsequently, under date not shown, petitioner executed two instruments in writing similar in all repects to the instrument of February 5, 1926, except that one of them applied only to taxes for the year 1917 and the other to taxes for the year 1918. Each of these instruments was executed by respondent on February 17, 1926."

EXHIBIT "H" TO PETITION FOR REVIEW

IT:PA:PYA-60D. ARM

October 7, 1926.

Mr. Friend M. Aiken, Cosden Building, Tulsa, Oklahoma.

SIR: The determination of your income tax liability for the years 1917 to 1920, inclusive, as set forth in office letters [fol. 61] of May 27, 1926, has been changed, as a result of your protest dated June 24, 1926, to disclose a deficiency in tax of $29,249.86, for 1920, and overassessments totalling $53,000.12 for 1917, 1918 and 1919. The adjustments made are explained in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-60D-ARM. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, (Signed) by C. R. Nash, Assistant to the Commissioner.

EXHIBIT "I" TO PETITION FOR REVIEW

Henry L. Doherty & Company, Six Wall Street, New York

November 10, 1916.

F. M. Aiken, New York.

[fol. 62] DEAR MR. AIKEN: This is to confirm the understanding reached with you today by which you and your associates give us an option, good until February 1, 1917, upon the entire $300,000 of capital stock of the Peerless Refining Company of Oklahoma for $1,250,000.

In consideration of this option, we hereby tender you our check for $50,000. It being understood that in event of our failure to complete the option on February 1, 1917, this payment is forfeited to you.

In the event that we exercise the option, this amount paid to apply on the purchase price. During the interim between this date and February 1st all of the earnings of the property to remain with the corporation.

The financial condition of the property being as set forth in the balance sheet of September, 1916.

Yours truly, Henry L. Doherty & Company, by Frank W. Frenauff.

BEFORE UNITED STATES BOARD OF TAX APPEALS,
WASHINGTON, D. C.

[Title omitted]

NOTICE OF APPEAL

To Clarence M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for the Respondent.

SIR: Please take notice that the undersigned attorney for the petitioner above named is this day mailing to the Clerk of the U. S. Board of Tax Appeals at Washington, D. C. a Petition for Review, by the U. S. Circuit Court of Appeals for the 8th Circuit, of the final order and decision of the Board in the above-entitled proceeding, decision in which case was by said Board promulgated on February 7, 1928 and Order of Redetermination entered upon the records of said Board on the 8th day of February, 1928.

[fol. 63] The undersigned Counsel for petitioner, Friend M. Aiken, is also requesting of said Clerk of said U. S. Board of Tax Appeals that said Petition for Review, together with copies of all necessary data, pleadings, etc., be transmitted to and filed with the U. S. Circuit Court of Appeals, 8th Circuit, at St. Louis, Mo.

Dated at Tulsa, Oklahoma, this 10th day of July, 1928.

Friend M. Aiken, by L. E. Cahill, Attorney for Petitioner.

Copy of the within notice and copy of Petition for Review is hereby accepted this 16th day of July, 1928.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, September 12, 1928, the foregoing petition for review, notice and proof of service certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

[Title omitted]

STIPULATION THAT APPEAL SHALL BE DECIDED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT—Filed Jul. 19, 1928, United States Board of Tax Appeals.

Whereas, the United States Board of Tax Appeals on February 7, 1928, promulgated its decision in case as above styled, Docket No. 21513, and on February 8, 1928, entered its Order of Redetermination in said case, and

Whereas the petitioner, Friend M. Aiken, desires to appeal said cause to the United States Circuit Court of Appeals for the Eighth Circuit, and

[fol. 64] Whereas said Circuit includes the territory in which is located the office of the Collector to whom said Friend M. Aiken made his return for the years involved in said case, and

Whereas, Sect. 1002-d of the Revenue Act of 1926, authorizes appeals from the Board of Tax Appeals which may by agreement be selected by the Commissioner and the taxpayer;

Now, therefore, it is hereby agreed by and between the Commissioner of Internal Revenue, and the Petitioner Friend M. Aiken, through his Attorney in Fact, L. E. Cahill, that said appeal may be lodged in and decided by the United States Circuit Court of Appeals for the Eighth Circuit.

C. M. Charest, Commissioner of Internal Revenue for the United States. Friend M. Aiken, by L. E. Cahill, his attorney-in-fact.

Now, Sept. 12, 1928, the foregoing Stipulation and Agreement certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal U. S. Board of Tax Appeals, 1924.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR TRANSCRIPT—Filed Jul. 16, 1928

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within sixty days from the date of the filing of the petition for review in the above state case, transmit to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit certified copies of the following documents:

[fol. 65] 1. The docket entries of proceedings before the United States Board of Tax Appeals in the case above entitled.

2. Pleadings before the Board.

3. Findings of fact, opinion, and decision of the Board.

4. Order of Redetermination.

5. Petition for review.

6. Notice of filing Petition for Review, with acknowledgment of receipt by the respondent herein.

7. Præcipe for Record on Appeal.

8. Clerk's Certificate of Transcirpt.

9. Agreement of Commissioner and Petitioner that case may be lodged in and decided by the U. S. Circuit Court of Appeals for the 8th Circuit.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the U. S. Circuit Court of Appeals for the 8th Circuit.

L. E. Cahill, Attorney for Petitioner, Friend M. Aiken.

July 12, 1928.

Rec'd July 16, 1928.

C. M. Charest, Gen. Counsel, Bureau of Internal Revenue.

Now, September 12, 1928, the foregoing Præcipe certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

(Seal U. S. Board of Tax Appeals. 1924.)

BEFORE U. S. BOARD OF TAX APPEALS

[Title omitted]

STIPULATION THAT ORIGINAL PETITION AND ANSWER OF COMMISSIONER MAY BE OMITTED FROM TRANSCRIPT ON APPEAL — Filed Sep. 10, 1928.

[fol. 66] It is hereby stipulated and agreed by and between Friend M. Aiken, the petitioner herein, and the Commissioner of Internal Revenue, the respondent herein, by their respective attorneys as follows:

1. That the taxpayer filed in this case on November 25, 1926, an original petition for review of the Commissioner's determination by the United States Board of Tax Appeals; that a copy thereof was received in the office of the General Counsel, Bureau of Internal Revenue, on November 27, 1926; and that the Commissioner's answer thereto was filed with the Board on January 26, 1927.

2. That an amended petition was filed in Washington, D. C., with leave of the Board granted on September 24, 1927; that a copy thereof was received in the office of the General Counsel on September 27, 1927; that, prior to September 24, 1927, the Division of the Board assigned to hear this case and counsel for the Commissioner assigned to try the case had departed from Washington for the purpose of holding hearings, including the instant case; that this case was heard in Tulsa, Oklahoma, on October 13, 1927, on the basis of allegations contained in the amended petition, copies of which were then furnished by counsel for the taxpayer; and that the case was heard upon the assumption that all material allegations contained in the amended petition stood denied by the Commissioner.

3. That the amended petition, together with this stipulation, may be made part of the transcript of record for review herein, and that there may be excluded from such record for review the original petition filed by the taxpayer and the Commissioner's answer thereto.

Dated at Washington, D. C., this 8th day of Sept., 1928.
L. E. Cahill, Attorney for the Petitioner. (Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, Sept. 12, 1928, the foregoing Stipulation certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal U. S. Board of Tax Appeals. 1924.)

[fols. 67 & 68] Appearances of counsel omitted in printing.

[fol. 69] Minute entry of argument and submission February 11, 1929, omitted in printing.

In United States Circuit Court of Appeals, Eighth Circuit

Order of Revivor

August 19, 1929.

This cause came on to be heard on the suggestion of the death of the appellant, Friend M. Aiken, and the motion of the Administratrix to revive this cause in the name of Annette Aiken, Administratrix of the estate of Friend M. Aiken, deceased, as Appellant, and it appearing that letters of administration have issued to the said Administratrix, it is ordered by this Court that this cause be, and the same is hereby, revived in the name of said Annette Aiken, as Administratrix of the estate of Friend M. Aiken, deceased, and that this cause henceforth proceed in the name of said Administratrix with the same force and effect as if said Friend M. Aiken had not deceased.

[fol. 70] In United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1929

No. 8340

Annette Aiken, as Administratrix of the Estate of Friend M. Aiken, Deceased, Appellant,

vs.

Commissioner of Internal Revenue, Appellee

On Petition to Review Decision of United States Board of Tax Appeals

Mr. Owen Owen (Mr. L. E. Cahill was on the brief) for appellant.

Mr. Randolph C. Shaw, Special Assistant to Attorney General (Mrs. Mabel Walker Willebrandt, Assistant Attorney General, Mr. Sewall Key, Special Assistant ~~to Attorney~~ General, Mr. C. M. Charest, General Counsel, Bureau of Internal Revenue, and Mr. Stanley Suydam, Special Attorney, Bureau of Internal Revenue, were with him on the brief,) for appellee.

Before Lewis and Van Valkenburgh, Circuit Judges, and Symes, District Judge

Opinion—Filed October 25, 1929

Symes, District Judge, delivered the opinion of the court.

This is an appeal from a decision of the United States Board of Tax Appeals, sustaining the right of the Commissioner of Internal Revenue to assess and collect from appellant Friend M. Aiken, now deceased, certain alleged deficiencies in income and war excess profit taxes for the [fol. 71] calendar years 1917 and 1918, amounting to $51,614.09 for the year 1917 and $986.30 for the year 1918. Since the filing of this appeal Annette Aiken, as Administratrix of the estate of Friend M. Aiken, deceased, has been substituted as appellant and the word "appellant" where used in this opinion refers to Friend M. Aiken, the original appellant.

Facts

Appellant, a resident citizen of the United States, was during the years 1917, 1918, 1919 and 1920 engaged in business with his principal offices located at Tulsa, Oklahoma.

On March 30, 1918, he filed with the Collector his income and profit tax return for the year 1917.

On March 18, 1919, he filed with the Collector a tentative income tax return for the year 1918 and filed his complete return for that year on April 28, 1919.

The assessment for the year 1917 depends upon whether under the following facts income should be determined in the year 1916 or 1917.

On November 10, 1916, the appellant and Henry L. Doherty & Company entered into an agreement evidenced by the following letter:

"Henry L. Doherty & Company, Six Wall Street, New York

November 10, 1916.

F. M. Aiken, New York.

Dear Mr. Aiken: This is to confirm the understanding reached with you today by which you and your associates give us an option, good until February 1, 1917, upon the entire $300,000 of capital stock of the Peerless Refining Company of Oklahoma for $1,250,000.

In consideration of this option, we hereby tender you our check for $50,000. It being understood that in event of our failure to complete the option on February 1, 1927, this payment is forfeited to you.

[fol. 72] In the event that we exercise the option, this amount paid to apply on the purchase price. During the interim between this date and February 1st all of the earnings of the property to remain with the corporation.

The financial condition of the property being as set forth in the balance sheet of September, 1916.

Yours truly, Henry L. Doherty & Company, by Frank W. Freuauff."

The check for $50,000 referred to in the letter was enclosed with it and the remainder of the purchase price of $1,200,000.00 was paid in the year 1917 and the entire capital stock of the Peerless Refining Company was transferred to Henry L. Doherty & Company in the year 1917.

During the entire year of 1916 Henry L. Doherty & Company were amply able to finance the matter and to have paid the whole purchase price in the year 1916 upon the exercise of the option.

On February 7, 1921, the appellant filed wtih the Collector the following waiver:

"I, Friend M. Aiken, in consideration of the assurance given me by officials of the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

Friend M. Aiken, Taxpayer, (Signed) by E. F. Blaise, Attorney-in-fact."

[fol. 73] On March 3, 1924, appellant executed and filed with the Collector a second waiver, which waiver was as follows:

"March 3, 1924.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States and for other purposes,' approved August 5, 1909. This waiver is in

effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the year or years mentioned.

(Signed) Friend M. Aiken, Taxpayer, (Signed) by D. H. Blair, Commissioner."

On February 16, 1925, appellant executed two more waivers, one for the year 1917 and one for the year 1916, which were delivered to the collector.

On March 12, 1925, the collector made a jeopardy assessment against the appellant for the calendar year 1917 in the sum of $70,740.88 and a jeopardy assessment against the appellant covering the calendar year of 1918 in the amount of $29,739.39. Thereafter and within ten (10) days the appellant filed claims in abatement with the Collector on both assessments, which claims were not accompanied by bonds.

On February 5, 1926, appellant executed an additional waiver covering the years 1917, 1918, 1919 and 1920 which purported to extend the time for assessment until December 31, 1926.

[fol. 74] On October 7, 1926, the Collector mailed to the appellant a deficiency letter in which appellant was notified that the collector had determined an over-assessment for the year 1917 of $19,126.79 and an over-assessment for the year 1918 in the sum of $28,753.09, leaving due as jeopardy assessments for the years 1917 and 1918 the amounts of $51,614.09 and $986.30 respectively.

On November 25, 1926, appellant filed his appeal with the Board of Tax Appeals from assessment set forth in deficiency letter of October 7, 1926. Three questions are raised by this appeal.

First. Did the Commissioner of Internal Revenue have the right to assess taxes against the appellant at the time such assessments were made?

Second. Although there was found to be a tax liability upon a tax timely assessed and computed in accordance

with law, was the collection of the tax by the Collector barred by the statute of limitations?

Third. Was the gain derived by the appellant on the sale of stock of the Peerless Refining Company taxable in the year 1916 or in the year 1917?

Appellant's return for the year 1917 was filed on March 30, 1918. On November 23, 1921, the Revenue Act of 1921 was approved. Section 250 of this Act provides that taxes due under any prior Revenue Act might be assessed and collected within five (5) years from the date of the filing of the return due under such law. Without any extension therefor, the Collector had until March 30, 1923, in which to make an assessment for the taxes for the year 1917.

Before the expiration of this period, however, appellant filed the waiver of February 7, 1921, which waived: "any and all statutory limitations as to the time within which assessments based upon appellant's liability for taxes for the year 1917 might be made."

It will be noticed that this waiver was unlimited as to time, but on April 11, 1923, the Commissioner of Internal Revenue promulgated a ruling known as Mimeograph 3085, which provided in part as follows:

[fol. 75] "Inasmuch as there are many waivers on file signed by tax payers as to the time for which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924."

Before the expiration date so fixed by the Commissioner had arrived and on, to-wit, March 3, 1924, the appellant executed the second waiver which applied not only to 1917 taxes but also to 1918 taxes. This waiver extended the period for "determination, assessment and collection" of 1917 and 1918 taxes for "a period of one (1) year after the expiration of the statutory period of limitations, or the statutory period of limitations as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the year or years mentioned."

Appellant's return for the year 1918 was filed April 28, 1919. By the Revenue Act of 1921, the Commissioner had five (5) years, or until April 28, 1924, to assess the 1918

taxes and by the waiver this period was extended to April 28, 1925. As to the 1917 taxes there was the unlimited waiver of February 7, 1921, the Commissioner's Mimeograph 3085 terminating all unlimited waivers as of April 1, 1924, and the second waiver of March 3, 1924, extending the period for one year after the expiration of the statutory period of limitations which carried this period to April 1, 1925, so that when the Commissioner's assessment of March 12, 1925, for both 1917 and 1918 taxes were made it was within the statutory period of limitations as extended by the waivers.

It is contended by the appellant that the waivers were void for lack of consideration.

In Loewen Realty Company v. Anderson, Collector, 31 Fed. (2d) 268, the same point was raised. The court there said:

"It is objected that the waiver was without consideration but the Statute requires nothing but a consent, without considering consideration, and the taxpayer should not in any event be allowed to repudiate a consent upon which the Commissioner has relied."

It can be further said that forbearance to act is always a good consideration.

Although there was a tax liability, was the collection of the tax barred by the statute of limitations?

[fol. 76] The assessment in the instant case was made after the passage of the Revenue Act of 1924 and before the expiration of the time within which such an assessment was barred, and therefore the assessment was timely made.

Sec. 278 of the Revenue Act of June 2, 1924, provides:

"Section 278 (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

(d) Where the assessment of the tax is made within the period prescribed in Section 277, or in this Section, such tax may be collected by distraint or by a proceeding in court begun within six years after the assessment of the tax.

Nothing in this act shall be construed as preventng the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this act."

In United States v. Crook, et al., 18 Fed. (2d) 449, (5th CCA), decided April 16, 1927, a similar question arose. The court there said:

"The assessment in question was made within the time prescribed in subdivision (2) of section 277, as it was made within five years after the return was filed. The provision of that subdivision 'that no proceeding in court for the collection of such taxes shall be begun after the expiration of such period' is not applicable to this case, as that provision is limited or qualified by the initial words of section 277, 'except as provided in section 278', and subdivision (d) of section 278 explicitly provides that, 'where the assessment of the tax is made within the period prescribed in section 277, * * * such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax.' "

[fol. 77] In Loewer Realty Company v. Anderson, 31 Fed. (2d) 268, (2nd C. C. A.), decided March 4, 1929, that court had a similar question before it and held that the tax could be collected. At p. 269 the court said:

"It is contended by the plaintiff that section 278 (d), 26 U. S. C. A. paragraph 1061, of the act of 1926, precluded the collection of any tax that had not been assessed within five years after the filing of the return and this because of the words 'within the statutory period of limitation properly applicable thereto.' But such an interpretation gives no effect whatever to section 278 (c), providing in substance that, where a waiver is signed, 'the tax may be assessed at

any time prior to the expiration of the period agreed upon.' It also involves a complete change in legislative policy over the act of 1924, although the language of section 278 (c) in the two acts providing for a consent in writing to the assessment of the tax after the time prescribed in Section 277 is identical.

(1-3) Statutes of limitation barring the collection of taxes must receive a strict construction in favor of the government. Limitation will not be presumed, in the absence of clear congressional action. E. I. Dupont de Nemours & Co. v. Davis, 264 U. S. at page 462, 44 S. Ct. 364, 68 L. Ed. 788; Bowers v. N. Y. & Albany Lighterage Co., 273 U. S. at page 349, 47 S. Ct. 389, 71 L. Ed. 676. But it is not necessary to invoke such a rule here. The plain purpose of section 278 of the act of 1926, as that of section 278 of the act of 1924, and section 250 (d) of the act of 1921 (42 Stat. 265), was to give the Commissioner additional time to assess taxes if he could obtain the consent of the taxpayer. Plaintiff's interpretation of the act of 1926 would render the consent valueless. But it is perfectly consonant with the language of section 278 (c) to say that the words 'statutory period of limitation applicable thereto' were intended to include both the five years allowed to make the assessment where no extension had been agreed to, and the five years, plus the extended period, in case a waiver had been signed. Each period is 'statutory,' for the statute provides for them both. In our opinion a fair reading of the act of 1926 shows that the Commissioner was within his rights in making the assessment within the extended period, and that the collector was authorized to require payment of the taxes within six years after such an assessment. Florsheim [fol. 78] Bros. Dry Goods Co. v. United States (C. C. A.) 29 F. (2d) 895. See, also, United States v. Crook (C. C. A.) 18 F. (2d) 449."

Adopting the reasoning in those two cases we hold that the tax could be collected.

That leaves the question: Was the sale as evidenced by the letter income during the year 1916 or 1917?

On sales of property gain alone represents income.

The agreement between Henry L. Doherty & Company and the appellant dated November 10, 1916, was merely

a bare option. Henry L. Doherty & Company were not liable for the purchase price and could not have successfully demanded a transfer of the stock of the Peerless Refining Company until after the exercise of the option in 1917. Until the option was exercised there was no certainty that it ever would be exercised, and therefore no certainty of gain until the option was actually exercised, which was during the year 1917.

The $50,000.00 paid during the year 1916, although a part of $1,250,000.00 that was finally paid, was not income merely because it was a payment, for the reason that until the entire amount had been paid the gain could not be computed. Bedell v. Commissioner of Internal Revenue, 30 Fed. (2d) 622.

The Commissioner, therefore, rightfully taxed as income in the year 1917 the gain derived from the sale of the appellant's stock to Henry L. Doherty & Company.

The judgment should be affirmed.

[fol. 79] In United States Circuit Court of Appeals, Eighth Circuit

No. 8340

Annette Aiken, as Administratrix of the Estate of Friend M. Aiken, Deceased, Appellant,

vs.

Commissioner of Internal Revenue

On Petition to Review Decision of United States Board of Tax Appeals

Decree—Oct. 28, 1929

This matter came on to be heard on the petition to review the decision of the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the said Board of Tax Appeals, be, and the same is hereby, sustained, without costs to either party in this Court.

And it is further ordered that the petition to review be, and the same is hereby, dismissed.

In United States Circuit Court of Appeals

Order Substituting Robert H. Lucas as Commissioner in the Place of David H. Blair

On motion of counsel for appellant (petitioner) and the stipulation of counsel for the respective parties. It is now [fol. 80] here ordered by this Court that Robert H. Lucas, Commissioner of Internal Revenue, be, and he is hereby, substituted as appellee (respondent) in this cause for David H. Blair, Commissioner of Internal Revenue, whose resignation became effective May 31, 1929, and that with this substtution the decree entered by this Court in this cause on October 28, 1929, have the same force and effect as if entered after this substitution had been made.

[fols. 81-89] Petition for rehearing, covering 9 pages, filed December 21, 1929, omitted from this print. It was denied and nothing more by order January 9, 1930.

[fol. 90] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing

January 9, 1930.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellant.

On Consideration Whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

[fol. 91] IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Annette Aiken, as Administratrix of the estate of Friend M. Aiken, deceased, was Appellant and the Commissioner of Internal Revenue was Appellee, No. 8340, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the eighteenth day of January, A. D. 1930, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the Members of the United States Board of Tax Appeals.

In Testimony Whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of February, A. D. 1930.

E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. (Seal United States Circuit Court of Appeals, Eighth Circuit.)

[fol. 92] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed May 5, 1930.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is

granted, the argument to be limited to the questions concerning the validity and effect of the waivers.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,908. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 69. Annette Aiken, administratrix of the estate of Friend M. Aiken, deceased, petitioner, vs. Robert H. Lucas, Commissioner of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed March 31, 1930. File No. 34,908.

FILE COPY

Office Supreme Court, U. S.
FILED
JUL 19 1930
CHARLES ELMORE CROPLEY
CLERK

No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1930

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRED M. AIKEN, DECEASED, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 69

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF Fred M. Aiken, Deceased, petitioner

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO ADVANCE

Comes now the respondent in the above-entitled cause, by his counsel the Solicitor General, and moves to advance this case to follow No. 23, *Charles H. Stange, Petitioner,* v. *The United States,* pending in this Court on writ of certiorari to the Court of Claims, granted on March 3, 1930.

A motion to advance is likewise filed in No. 115, *W. P. Brown & Sons Lumber Company, Petitioner,* v. *Robert H. Lucas, Commissioner of Internal Revenue,* it being the purpose of these motions to ask that the three cases referred to be heard consecutively. In support of this motion counsel submits the following statement:

No. 69, *Annette Aiken, Administratrix, Petitioner,* v. *Robert H. Lucas, Commissioner of Inter-*

2449—30

nal Revenue, is before the Court on writ of certiorari, granted May 5, 1930, to the United States Circuit Court of Appeals for the Eighth Circuit. No. 115, *W. P. Brown & Sons Lumber Company, Petitioner,* v. *Robert H. Lucas, Commissioner of Internal Revenue,* is before the Court on writ of certiorari, granted June 2, 1930, to the United States Circuit Court of Appeals for the Sixth Circuit.

The three cases present the general question whether a written consent, executed by the taxpayer and the Commissioner of Internal Revenue under the provisions of Section 250(d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265), extending the period of limitation upon the assessment and collection of income taxes, is valid when given after the expiration of the period of limitation.

As there are other related questions presented in each case in connection with the construction and interpretation of Section 250(d) of the Revenue Act of 1921, *supra,* it is thought the cases should not be consolidated for argument, but that it will be convenient to the Court and counsel if they are heard consecutively as separate cases in the order indicated.

Opposing counsel concur in this motion.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

MAR 31 1930

CHARLES ELMORE CROPLEY

No. ... 69

In the Supreme Court of the United States

October Term, 1929.

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

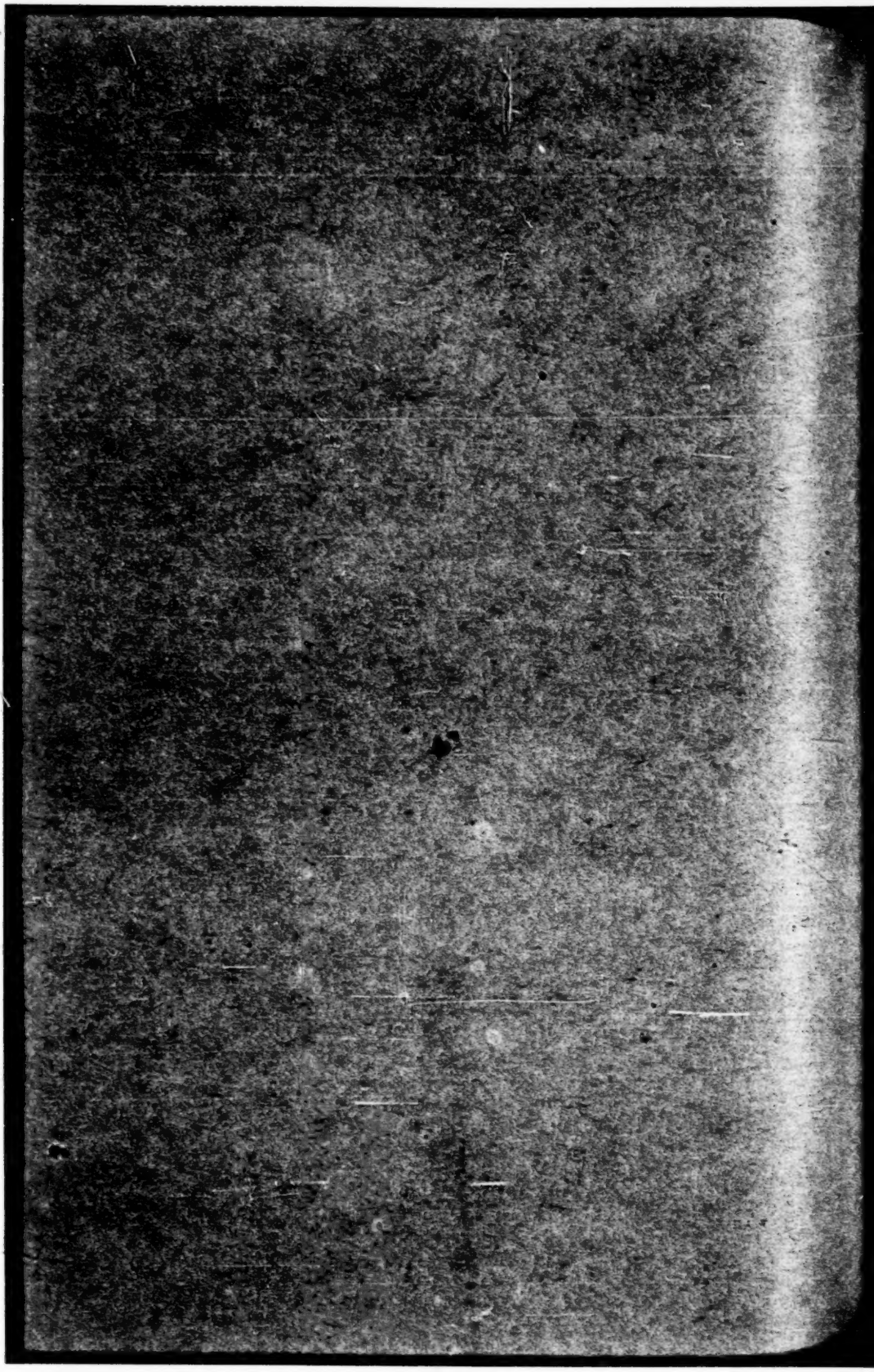
vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Petition for Writ of Certiorari and Brief in Support Thereof.

L. E. CAHILL,
Attorney for Petitioner.

L. KARLTON MOSTELLER,
W. LEO AUSTIN,
Of Counsel.



INDEX.

	PAGE
Statement	1
Reasons for granting the petition	3
The opinions of the court below	5
Jurisdiction	5
The facts	6
Findings of fact	6
Waiver (individual)	7
Income and profits tax waiver, March 3, 1924	7
Income and profits tax waiver, Feb. 16, 1925	8
Income and profits tax waiver, Feb. 16, 1925	9
Income and profits tax waiver, Feb. 5, 1926	11
Letter of Commissioner Blair, Oct. 7, 1926	12
Statutes involved	13
Specification of error	17
Summary of argument	17
Argument	18
The decision below on the point herein discussed is at variance with the facts as shown by the record to exist	18
The alleged waiver of February 7, 1921, must be interpreted according to its terms and cannot be extended to include matters not expressed therein	22
A waiver executed after the statute has expired is void	23
The assessment-only waiver of February 7, 1921, if valid at all, expired on April 1, 1924	25
Conclusion	26

AUTHORITIES CITED.

PAGES

Act of February 13, 1925, (U. S. Code, Title 28, Sec. 347 5

Andreae v. *Redfield*, 98 U. S. 225.....21, 24

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346 3

Bennecke v. *Insurance Co.*, 105 U. S. 355..... 21

Bowers, Collector, v. *New York and Albany Lighterage Company*, 273 U. S. 346..... 21

Columbian Iron Works v. *Brock*, dec. by District Court, Middle District of Tenn., on 9-28-1929..... 24

Florsheim Brothers Dry Goods Company, Ltd., v. *The United States*, (Feb. 24, 1930).....6, 23

Hood Rubber Co. v. *White*, 28 Fed. (2) 54 (sustained on appeal 33 Fed. (2) 739) 22

Joy Floral Company v. *Commissioner of Internal Revenue*, 29 Fed. (2d) 865 .....4, 20, 22, 24

Pence v. *Langdon*, 99 U. S. 578..... 21

Revenue Act of 1913, Sec. E (1)..... 13

Revenue Act of 1916, Sec. 9-a 13

Revenue Act of 1917, Sec. 14-a..... 13

Revenue Act of 1918, Sec. 250-d 14

Revenue Act of 1921, Sec. 250-d 14

Revenue Act of 1924, Secs. 277-a-2, 278.....14, 15

Revenue Act of 1926, Secs. 277-a-3, 278, 1106-a.....15, 16

Revenue Act of 1928, Sec. 276-b 16

Russell, et al., v. *United States*, 278 U. S. 181..... 3

Spear & Company v. *Heiner*, 34 Fed. (2d) 795..... 24

Toxaway Mills v. *United States*, 61 Ct. Cl. 363..... 21

Walsh v. *Price*, 34 Fed. (2d) 57..... 4

Wells Brothers Company of Ill. v. *The Commissioner*, 10 B. T. A. 79 24

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. .....

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION *for* WRIT *of* *CERTIORARI.*

May It Please the Court:

The petitioner, Annette Aiken, administratrix of the estate of Friend M. Aiken, deceased, prays that a writ of *certiorari* issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered in the above entitled case on January 9, 1930.

Statement.

This action, which is based upon alleged deficiency in income and war excess profits taxes for the calendar year 1917 in the amount of $51,614.90, was begun in the United States Board of Tax Appeals, Washington, D. C., by the

filing of a petition on the 25th day of November, 1926. It was tried by the Board upon an amended petition containing eleven counts, among which were the following:

(1) Had the Commissioner authority to entertain waivers extending the period of assessment of income taxes beyond the period prescribed by law, unless and until such waivers were expressly authorized by law?

(2) Does a waiver consenting to extension of period for assessment extend by implication or otherwise the period for collection?

(3) Does a waiver consenting to extension of period for assessment of income taxes imposed under the Revenue Act of September 8, 1916, as amended on October 3, 1917, extend the period for assessment, and/or collection of war excess profits taxes imposed under the Revenue Act of October 3, 1917?

(4) Can a waiver signed after the expiration of the statute of limitations revive the rights of the Commissioner to assess and collect income and excess profits taxes?

On the 7th day of February, 1928, judgment was rendered in favor of the respondent and against the petitioner (R. 36).

The petitioner filed a petition for review in the United States Circuit Court of Appeals for the Eighth Circuit, and on the 25th day of October, 1929, the said judgment was affirmed. A petition for rehearing was denied by the said Circuit Court of Appeals on the 9th day of January, 1930.

The effect of the decision of the Circuit Court of Appeals is that the Commissioner of Internal Revenue was sus-

tained in his assumption that there existed an unbroken and perfect chain of extensions or waivers which resulted in a valid assessment of both income and war excess profits taxes alleged to be due and the questions enumerated above were all resolved in favor of the respondent.

For the language of the statute involved and a detailed statement of the facts, reference is made to the supporting brief included herewith.

Reasons for Granting the Petition.

1. The Circuit Court of Appeals erred in holding that the alleged waiver of assessment-only executed prior to statutory authority for such waiver, was valid.

2. The decision of the Circuit Court of Appeals that the purported assessment-only waiver extended the period for collection, is not in harmony with the rulings of this court.

—*Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346;

Russell, et al., v. *United States*, 278 U. S. 181.

3. The decision of the Circuit Court of Appeals that the alleged waiver extending the period for assessment of taxes imposed under the Revenue Act of 1916 as amended on October 3, 1917, extends the period for assessment and/or collection of taxes imposed by the War Excess Profits Tax Act of October 3, 1917, is not in harmony with the terms and provisions of the alleged waiver relied upon by the court.

4. The decision of the Circuit Court of Appeals that a waiver signed after the expiration of the statute of limita-

tions can revive the rights of the Commissioner to assess and collect income and war excess profits taxes is not in harmony with the ruling of the Court of Appeals, District of Columbia, in *Joy Floral Company* v. *Commissioner of Internal Revenue*, 29 Fed. (2d) 865, and that of the District Court for the Eastern District of New York in *Walsh* v. *Price*, 34 Fed. (2d) 57.

Wherefore, it is respectfully submitted that this petition for writ of *certiorari* to review the judgment of the Circuit Court of Appeals should be granted.

ANNETTE AIKEN,
Administratrix of the Estate of
Friend M. Aiken, Deceased,

By L. E. CAHILL,
Counsel for Petitioner.

L. KARLTON MOSTELLER,
W. LEO AUSTIN,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1929.

No. .....

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI.*

I.

The Opinions of the Courts Below.

The opinion of the United Board of Tax Appeals is reported in 10 B. T. A. 553. The Circuit Court of Appeals decision is not yet reported, but was rendered on October 25, 1929, and petition for rehearing denied on January 9, 1930.

II.

Jurisdiction.

(1) The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

(2) The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on October 25, 1929; and a petition for a rehearing was denied on January 9, 1930.

III.

The Facts.

The proceedings before the United States Board of Tax Appeals and the Circuit Court of Appeals involved the taxable years of 1917 and 1918, but in view of this court's decision in the case of *Florsheim Brothers Dry Goods Company, Ltd.*, v. *The United States,* (decided Feb. 24, 1930), the petitioner's contentions with respect to the year 1918 are abandoned. The questions presented in this appeal relate only to the statute of limitations for assessment and collection of the additional income and war excess profits taxes asserted by the Commissioner of Internal Revenue for the calendar year 1917.

Findings of fact:

Petitioner is a resident citizen of the United States, and was, during the years 1917, 1918, 1919 and 1920, engaged in business with his principal offices located at Tulsa, Oklahoma.

Petitioner filed an income and profits tax return for the year 1917 with the Collector on March 30, 1918. On March 18, 1919, petitioner filed with the Collector a tentative income tax return for the year 1918, and on April 28, 1919, he filed with the Collector his complete return for said year.

On February 5, 1921, petitioner executed the following instrument in writing:

WAIVER (INDIVIDUAL).

I, Friend M. Aiken, in consideration of the assurance given me by officials of the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

Friend M. Aiken,
By E. F. Blaise, (Signed)
Attorney-in-fact Taxpayer.

The above instrument was filed with respondent on February 7, 1921, and now bears on its face the following notation: "Approved D. H. Blair, Commissioner of Internal Revenue, Date Nov. 29, 1922."

On March 3, 1924, petitioner executed an instrument in writing, which was thereafter executed by respondent and which reads:

March 3, 1924.

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue, hereby consent to a determination,

assessment, and collection of the amount of income, excess profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Sec. 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes" approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

Friend M. Aiken, (Signed)
Taxpayer,

By D. H. Blair, (Signed)
Commissioner.

Under date of February 16, 1925, petitioner executed the following instrument in writing and thereafter delivered it to respondent:

February 16, 1925.

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws, F. M. Aiken, a taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts. This

waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and *(1)* no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or *(2)* if any appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

F. M. Aiken (Signed)
By E. F. Blaise,
Attorney - in - fact
Taxpayer.

This instrument is stamped on its face "Received March 2, 1925, Service Division." It was not executed by respondent and bears the further notation in writing, "not acceptable."

On February 16, 1925, petitioner executed the following instrument in writing and thereafter delivered it to respondent:

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws, F. M. Aiken, a taxpayer, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making an assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and

shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and *(1)* no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or *(2)* if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

F. M. Aiken, (Signed)
By E. F. Blaise,
Attorney - in - Fact
Taxpayer.

This instrument was not executed by respondent. Stamped on its face is the notation "Received March 2, 1925, Service Division."

On March 12, 1925, respondent made a jeopardy assessment against petitioner covering the calendar year 1917, in the amount of $70,740.88. On the same day respondent made a jeopardy assessment against petitioner covering the calendar year 1918 in the amount of $29,739.39. Within ten days after notice and demand on both the above jeopardy assessments, petitioner filed with the Collector claims in abatement covering both said assessments. The claims were not accompanied by bonds.

On February 5, 1926, petitioner executed an instrument in writing, which was thereafter executed by respondent, and which reads:

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to Jan. 1, 1922.)

February 5, 1926.

In pursuance of the provisions of existing Internal Revenue Laws, Friend M. Aiken, taxpayer of Tulsa, Oklahoma, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, 1919, and 1920, under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and *(1)* no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or *(2)* if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Friend M. Aiken, (Signed)
By L. E. Cahill, Attorney-in-Fact,
Taxpayer,
D. H. Blair, (Signed)
Commissioner.

Subsequently, under date not shown, petitioner executed two instruments in writing similar in all respects to the instrument of February 5, 1926, except that one of them applied only to taxes for the year 1917, and the other to taxes for the year 1918. Each of these instruments was executed by respondent on February 17, 1926.

Under date of October 7, 1926, there was mailed to petitioner from the office of respondent a letter which reads as follows:

October 7, 1926.

IT:PA:PYA-6OD
ARM
Mr. Friend M. Aiken,
Cosden Bldg.,
Tulsa, Oklahoma.

Sir: The determination of your income tax liability for the years 1917 to 1920, inclusive, as set forth in office letters of May 27, 1926, has been changed, as a result of your protest dated June 24, 1926, to disclose a deficiency in tax of $29,249.86 for 1920, and over-assessments totalling $53,000.12 for 1917, 1918 & 1919. The adjustments made are explained in the attached statement.

In accordance with the provisions of Sec. 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the U. S. Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Interal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:PYA-60D-ARM.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. Blair, Commissioner,

By C. R. Nash, (Signed)

Assistant to the Commissioner.

In this letter respondent determined an over-assessment for the year of 1917 of $19,126.79 and an over-assessment for the year 1918 of $28,753.09. These over-assessments reduced the jeopardy assessments for the years 1917 and 1918 to the amounts of the deficiencies above shown.

On November 25, 1926, petitioner filed with the Board his appeal from the letter of October 7, 1926.

IV.

Statutes Involved.

The pertinent provisions of the statutes are as follows:

1913 Act, section E (1);

1916 Act, section 9-A;

1917 Act, section 14-a:

"That all assessments shall be made by the Com-

missioner * * * and all persons shall be notified of the amount for which they are respectively liable on or before the 1st day of June of each successive year * * * except in cases of refusal or neglect to make such return and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner * * * shall, upon the discovery thereof, at any time within three years after said return is due, or has been made, make a return upon the information obtained * * * and the assessment * * * thereon shall be paid * * * immediately upon notification of the amount of such assessment * * *."

1918 Act, section 250-d:

"* * * The amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * * * *."

1921 Act, section 250-d:

"The amount of * * * any * * * taxes due under this act for prior taxable years * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit for the collection of any such taxes * * * shall be begun after the expiration of five years after the date when such return was filed * * *."

1924 Act, section 277-a-2:

"The amount of * * * taxes imposed by the * * * Revenue Act of 1916, the Revenue Act of 1917, the

Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Section 278:

"*(c)* Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in Sec. 277, for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

"*(d)* Where the assessment * * * is made within the period prescribed in Sec. 277 * * * such tax may be collected by distraint or by a proceeding in court * * * begun within six years after the assessment of the tax. Nothing in this act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"*(e)* This section shall not *(1)* authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the period of limitation then in existence, or *(2)* affect any assessment made, or distraint or proceeding in court begun, before the enactment of this act."

1926 Act, section 277 (a), except as provided in section 278:

"* * * *Sec. 277 (a) (3).* The amount of income, excess profits, and war profits taxes imposed by the act entitled 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for

other purposes,' approved August 5, 1909, the act entitled, 'An act to reduce tariff duties and to provide revenue for the government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

"* * * *Sec. 278 (c).* Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

Section 1106 (a):

"The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability; * * *."

1928 Act, section 276-b:

"*Waivers.* Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreement in writing made before the expiration of the period previously agreed upon."

V.

Specification of Error.

The errors which petitioner urges as ground for the granting of the writ of *certiorari* and for the reversal of the judgment of the Circuit Court of Appeals for the Eighth Circuit are:

(a) That the court erred in holding that the deficiency for 1917 as determined by the Commissioner of Internal Revenue was not barred of collection by the statute of limitations.

VI.

Summary of Argument.

1. Since the tax was not assessed until after the expiration of the period provided for by law, and further since the tax has not yet been collected, it is necessary to look to the waivers signed by the taxpayer and the Commissioner to determine *(a)* whether the assessment was valid or not, and *(b)* if the tax is still collectible.

2. The waiver of 1921, if valid at all and binding upon the taxpayer, extended the statute of limitations only for the purpose of assessment and did not extend the period for collection.

3. The alleged waiver of 1921 did not specifically or by inference mention taxes imposed by the War-Excess Profits Tax Act of 1917.

4. No other waiver was signed until after the period for assessment and collection, as provided by the statutes had expired.

5. The waiver of 1924 having been signed after the expiration of the statute of limitations, but within the period for assessment—not collection—as extended by the alleged waiver of 1921, does not revive the authority of the Commissioner to collect any income taxes asserted to have been waived by the alleged waiver of 1921, nor does it revive the authority of the Commissioner to assess, and/or collect any taxes imposed by the War Excess Profits Tax Act of 1917.

VII.

ARGUMENT.

POINT A.

The decision below on the point herein discussed is at variance with the facts as shown by the record to exist.

On November 23, 1921, the Revenue Act of 1921, was approved. Section 250 (d) of this act provided that taxes due under any prior revenue act might be assessed and collected within five years from the date of the filing of the return under such law. The return of this petitioner for the year 1917 was filed on March 30, 1918 (R. 38). Therefore, without extension of the period, the respondent had until March 30, 1923, within which to make assessment.

Prior to the expiration of this period, the petitioner on February 7, 1921, filed with the respondent an alleged waiver of assessment-only of "any and all statutory limitations" as to the time within which assessments might be made upon petitioner's liability in respect to taxes "imposed by the Act of Congress, approved Sept. 8, 1916, as amended by

Act of Congress approved October 3, 1927" for the year 1917. It will be noted that this waiver was unlimited as to time, but on April 11, 1923, the Commissioner of Internal Revenue promulgated a ruling known as Mimeograph 3085, which provided that all unlimited waivers as to the time for assessment then on file for 1917 would expire on April 1, 1924.

The Circuit Court, on page 6 of its opinion, states:

"Before the expiration date so fixed by the Commissioner had arrived and on, to-wit, March 3, 1924, the appellant executed the second waiver which applied not only to 1917 taxes but also to 1918 taxes. This waiver extended the period for 'determination, assessment and collection' of 1917 & 1918 taxes for a 'period of one (1) year after the expiration of the statutory period of limitations, or the statutory period of limitations as extended by any waivers already on file with the Bureau within which assessments of taxes may be made for the year or years mentioned.'

"Appellant's return for the year 1918 was filed April 28, 1919. By the Revenue Act of 1921, the Commissioner had five (5) years, or until April 28, 1924, to assess the 1918 taxes and by the waiver this period was extended to April 28, 1925. As to the 1917 taxes there was the unlimited waiver of Feb. 7, 1921, the Commissioner's Mimeograph 3085, terminating all unlimited waivers as of April 1, 1924, and the second waiver of March 3, 1924, extending the period for one year after the expiration of the statutory period of limitations which carried this period to April 1, 1925, so that when the Commissioner's assessment of March 12, 1925, for both 1917 and 1918 taxes were made it was within the statutory period of limitations as extended by the waivers."

From the foregoing excerpts from the opinion, it is evident that the court assumed an unbroken and perfect chain of extensions or waivers which resulted in a valid assessment of both income taxes and war excess profits taxes for the year in question. The following discussion will show that no such circumstances existed.

The first and unlimited waiver filed on February 7, 1921, and which was thereafter signed and thereby accepted by the Commissioner of Internal Revenue on November 29, 1922, provided for assessment only of additional income taxes for the calendar year 1917. At the time this alleged waiver was requested by the Commissioner and signed by petitioner there was no statutory provision for waivers and the Commissioner of Internal Revenue was without authority to demand, accept or consider such waiver until passage of the Revenue Act of 1921, on November 23, 1921. The duties of the Commissioner of Internal Revenue are defined and limited by statute and where he acts without statutory authority such acts are void. (*Joy Floral Company* v. *Commissioner*, 29 Fed. (2d) 865.)

Hence the petitioner earnestly contends that the Commissioner of Internal Revenue was without authority, statutory or otherwise, to demand, accept or consider a waiver filed prior to November 23, 1921, and that the assessment waiver filed February 7, 1921, was therefore void and that authority to assess 1917 income taxes in the instant case expired on March 30, 1923. When viewed in the most favorable light, waivers executed prior to statutory provision must be construed as contracts and as such are void un-

less supported by a consideration. (*Andreae* v. *Redfield*, 98 U. S. 225.)

The petitioner further contends that section 250 (d) of the Act of 1921, superseded the waiver of February 7, 1921. (*Toxaway Mills* v. *United States*, 61 Ct. Cl. 363.) The general rule is that a waiver extends only to rights existing when it is made. (*Pence* v. *Langdon*, 99 U. S. 578, and *Bennecke* v. *Insurance Co.*, 105 U. S. 355.) Following the rule of these cases it appears that a consent authorized by the Act of 1921, is one given after its enactment. With the passage of the Act of November 23, 1921, the Commissioner had a year and four months within which to assess and collect a tax or to obtain a new waiver in conformity with the provisions of this act. He did neither the one nor the other.

In *Bowers, Collector,* v. *New York and Albany Lighterage Company*, 273 U. S. 346, this court held that the government was barred from collection after the five-year period, even though assessment had been made during the authorized period. It follows, therefore, that although this court should hold that assessment was made under the authority granted by the assessment-only waiver which was unlimited as to time, the period for collection was limited to the statutory provisions and collection was barred after March 30, 1923.

After the assessment-only waiver of February 7, 1921, was filed the Commissioner did nothing further to revive the statute of limitation until the assessment and collection waiver dated March 3, 1924, was demanded and filed. This waiver, if valid at all, did not extend the limit for collection beyond March 30, 1924. The five-year period provided by

section 250 (d) of the Revenue Act of 1921, with respect to the 1917 return filed on March 30, 1918, had expired March 30, 1923. However, if this court should hold that this waiver was valid from the date filed, then by its terms it would expire on March 3, 1925, and the Commissioner has been without authority to assess and collect the 1917 taxes since that date. This contention is supported by the decision in *Hood Rubber Co.* v. *White*, 28 Fed. (2) 54 (sustained on appeal 33 Fed. (2) 739).

Furthermore, if this court should hold that the waiver of March 3, 1924, was signed during the period of the assessment-only waiver of February 5, 1921, the facts show that the said waiver of March 3, 1924, was signed after the period for collection had expired.

POINT B.

The alleged waiver of February 7, 1921, must be interpreted according to its terms and cannot be extended to include matters not expressed therein.

Granting that the waiver of February 7, 1921, was a valid instrument, it did not operate to extend the period for assessment and collection of the taxes imposed by the War Excess Profits Tax Act of October 3, 1917. The waiver expressly states, "* * * for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by Act of Congress, approved October 3, 1917, * * *." On October 3, 1917, an amendment to the Act of September 8, 1916, was approved. On the same date the War Excess Profits Tax Act was approved. This latter act is not an

amendment to the Act of September 8, 1916. This failure to include a waiver for assessment and collection of taxes imposed by the War Excess Profits Tax Act is partially corrected in the waiver executed on March 3, 1924, which, however, was executed and filed after the tolling of the statute with respect to that tax and is therefore void. The petitioner's contention with respect to the interpretation to be given the waiver of February 7, 1921, if valid for any purpose, is fully sustained by the court in *Joy Floral Co.* v. *Commissioner*, 29 Fed. (2d) 865, and certainly cannot be interpreted in a manner to extend the statute of limitations for assessment of taxes imposed by the War Excess Profits Tax Act of October 3, 1917.

This court has held that a waiver of the statute of limitations is nothing more than what it is termed on its face—waiver. (*Florsheim Brothers Dry Goods Company, Ltd., et al.*, v. *The United States*, dec., Feb. 24, 1930.) This being true, the petitioner contends that the instrument of February 7, 1921, even if found to be valid for any purpose whatsoever, is a waiver only of the statute of limitations with respect to the taxing statutes specifically mentioned therein and is not susceptible of any other interpretation. It follows, therefore, that the assessment and collection of the taxes imposed by the War Excess Profits Tax Act of October 3, 1917, have been barred since March 30, 1923.

Point C.

A Waiver Executed After the Statute Has Expired Is Void.

Petitioner contends that the assessment and collection waiver filed on March 3, 1924, was filed after the statute of

limitations had expired and was void for lack of consideration. (*Andreae* v. *Redfield*, 98 U. S. 225.) The petitioner further contends that there is no authority for the execution of waivers after the statute has run. In *Spear & Company* v. *Heiner*, 34 Fed. (2d) 795, it was held that a waiver executed after the statute has run to be effective must be supported by a consideration and that the tax collected on the theory that the waiver was valid was unlawful and plaintiff entitled to recover. The courts have similarly held in *Joy Floral Co.* v. *The Commissioner*, 29 Fed. (2d) 865; *Walsh* v. *Price*, 34 Fed. (2d) 57; *Columbian Iron Works* v. *Brock*, dec. by District Court, Middle District of Tenn., on 9-28-1929, and *Wells Brothers Company of Ill.* v. *The Commissioner*, 10 B. T. A. 79.

The question of the validity of a waiver executed after the period of limitations already had expired is now before this honorable court in the case of *Stange* v. *United States*. The petition for writ of *certiorari* in that case was granted on March 3, 1930, and bears Docket No. 554.

The assessment of the additional tax here involved was made at a time when there was no valid waiver on file and the waiver in effect at the time of such assessment was void because of having been executed after the expiration of the statutory period for assessment. The provisions of Sec. 278 (c) of the Revenue Act of 1924, relate only to an agreement entered into prior to the expiration of the statutory period. (*Joy Floral Company* v. *Commissioner*, 29 Fed. (2d) 865; *Spear and Company* v. *Heiner*, 34 Fed. (2d) 795, and *Columbian Iron Works* v. *Brock*, decided Sept. 28, 1929). Section 278 (d) of the 1924 Act can be applied only in those

cases where an assessment of the tax has been made within the statutory period and subsequent to the passage of that act.

Point D.

The assessment-only waiver of February 7, 1921, if valid at all, expired on April 1, 1924.

The period of limitation for collection expired on March 30, 1923. The period for collection having expired it is contended that the assessment and collection waiver of March 3, 1924, could not revive the right of the Commissioner to collect any taxes which might be determined to be due for 1917. The waiver of March 3, 1924, was the first waiver filed which referred in any manner to the war excess profits taxes imposed by the Act of October 3, 1917, and was submitted more than five years after the return for the year 1917 was filed. For reasons which appear in the discussion of Point C, *supra*, the right of the Commissioner to assess and collect war excess profits taxes was not revived by the assessment and collection waiver of March 3, 1924.

Conclusion.

In view of the fact that the question here involved is one of great importance in the practical administration of the revenue laws and of the large amount of money involved, it is respectfully submitted that the petition for writ of *certiorari* should be granted.

L. E. Cahill,
Attorney for Petitioner.

L. Karlton Mosteller,
W. Leo Austin,
Of Counsel.

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No. 69

In the Supreme Court of the United States

October Term, 1930.

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

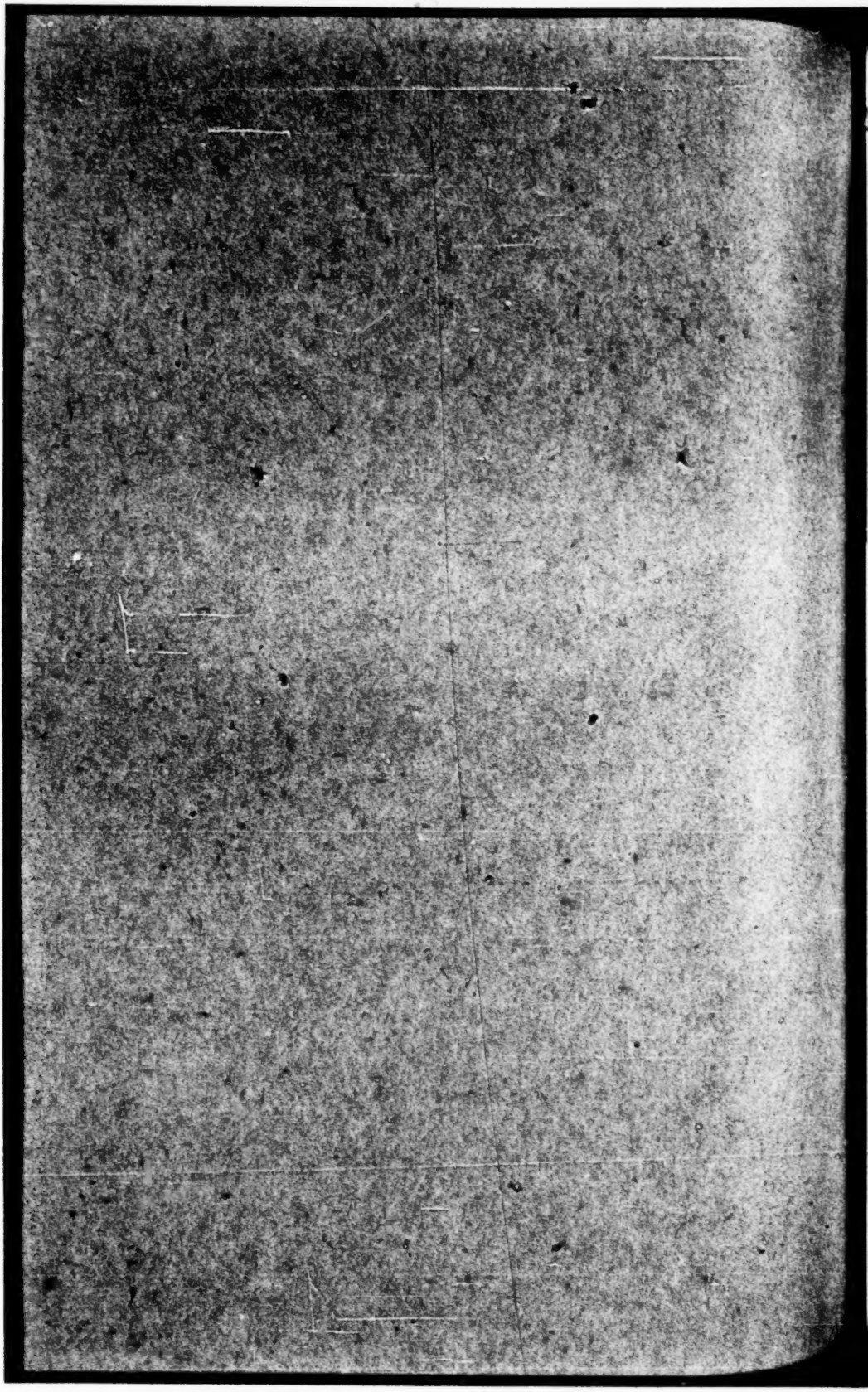
vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF FOR PETITIONER.

JAMES H. MAXEY,
Counsel for Petitioner.

L. E. CAHILL,
W. LEO AUSTIN,
Of Counsel.



INDEX.

	PAGE
Opinions of the courts below	2
Jurisdiction	2
Statement of the case	2
Specification of errors	3
Argument	4
The assessment-only waiver of February 5, 1921, related only to income taxes and did not extend the statutory period for collection thereof	4
A waiver given after the expiration of the statutory period for assessment and collection is invalid	17
Conclusion	23
Appendix:	
Revenue Act of 1913, Sec. E (1)	25
Revenue Act of 1916, Sec. 9-a	25
Revenue Act of 1917, Sec. 14-a	25
Revenue Act of 1918, Sec. 250-d	25
Revenue Act of 1921, (42 Stats. 265-266) Sec. 250-d	25
Revenue Act of 1924, (43 Stats. 299-300) Secs. 277-a-2, 278 (c), (d), (e)	26
Revenue Act of 1926, (44 Stats. 58-59) Secs. 277 (a), 1106 (a)	27
Revenue Act of 1928, Sec. 276-b	28

AUTHORITIES.

	PAGES
Act of Sept. 8, 1916	15, *et seq.*
Act of Oct. 3, 1917	3, *et seq.*
Act of Nov. 23, 1921	5, *et seq.*
Act of Feb. 13, 1925 (U. S. Code, title 28, Sec. 247)	2, *et seq.*

AUTHORITIES—CONTINUED.

PAGES

Anthony v. *Jasper County*, 101 U. S. 693..... 7

Benjamin Russell case, 278 U. S. 181..... 14

Bennecke v. *Insurance Company*, 105 U. S. 355.....7, 11

Bowers, Collector, v. *New York and Albany Lighterage Company*, 273 U. S. 346.....9, 13, 14

Coler v. *Cleburne*, 131 U. S. 162..... 7

Columbian Iron Works v. *Lee Brock, Collector*, (U. S. District Court for the Middle District of Tennessee, September 28, 1929)..... 18

Chas. H. Stange v. *The United States*, decided November 4, 1929..... 17

De Arnand v. *United States*, 151 U. S. 488..... 7

Florsheim Brothers Dry Goods Company, Ltd., et al., v. *The United States*, 280 U. S. 453..... 16

Graylock Mills v. *The Commissioner*, 31 Fed. (2d) 655 (Circuit Court of Appeals, Second Circuit).....18, 22

Hunter v. *United States*, 5 Peters 173..... 7

Joy Floral Company v. *Commissioner*, 29 Fed. (2d) 865.....6, 16, 17, 22

Mimeograph 3085..... 8, 13, 17

Pence v. *Langdon*, 99 U. S. 578.....7, 11

Pictorial Printing Company v. *The Commissioner*, 38 Fed. (2d) 563.....18, 19, 22

Pierce v. *United States*, 7 Wall. 666..... 7

Spear & Company v. *Heiner*, 34 Fed. (2d) 795..... 18

Toxaway Mills v. *United States*, 61 Ct. Cl. 363.....7, 11

United States v. *Updike, et al.*, 281 U. S. 489..... 8

Walsh v. *Price*, 34 Fed. (2d) 57..... 18

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1930.

No. 69

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, *Petitioner,*

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF *for* PETITIONER.

May It Please the Court:

This is an appeal granted by this court from a decision of the Circuit Court of Appeals for the Eighth Circuit holding that the amount of certain income and excess profits taxes for the year 1917 was not barred of collection. Copies of the sections of the Revenue Acts involved in this appeal may be found in the appendix of this brief.

Opinions of the Courts Below.

The opinion of the United States Board of Tax Appeals is reported in 10 B. T. A. 553, and is a part of the record on this appeal (R. 46-50). The decision of the Circuit Court of Appeals for the Eighth Circuit was rendered on October 25, 1929, and is reported in 35 Fed. (2) 620. It is a part of the record on this appeal (R. 71-79).

Jurisdiction.

This court has heretofore granted a writ of *certiorari* under Sec. 240 (a) of the Judicial Code, as amended by the Act of Congress of February 13, 1925 (U. S. Code, Title 28, Sec. 347).

The date of the decree of the Circuit Court of Appeals is October 28, 1929 (R. 79). A petition for rehearing was denied on January 9, 1930 (R. 80). The petition for writ of *certiorari* was filed on March 31, 1930, and was granted on May 5, 1930 (R. 81-82).

This is an action filed in the United States Board of Tax Appeals by the petitioner against the Commissioner of Internal Revenue for a review of his determination of the amount of Income and War-Excess Profits Taxes due for the calendar year 1917.

Statement of the Case.

The facts in this case as found by the Board of Tax Appeals appear at pages 40-46 of the record. The pertinent portions thereof may be summarized as follows:

The petitioner filed his 1917 income tax return on March 30, 1918. On February 5, 1921, he executed and filed a waiver extending indefinitely the period within which assessment of income taxes provided by the Revenue Act of 1916, as amended by the Act of October 3, 1917, could be made (R. 40). On March 3, 1924, petitioner executed and filed a consent in writing extending the period for both assessment and collection for one year from its date, or for one year from the expiration of the statutory period as extended by any other waiver on file (R. 41). On March 12, 1925, the Commissioner of Internal Revenue made a jeopardy assessment of taxes found to be due (R. 43).

Specification of Errors.

The Circuit Court of Appeals erred in its conclusions of law in this case as follows:

(1) In holding that the alleged assessment-only waiver of February 5, 1921, extended the period for collection of Income and War-Excess Profits Taxes for 1917.

(2) In holding that a waiver executed after the expiration of the statute of limitations can revive the right of the Commissioner to assess and collect Income and War Excess Profits Taxes.

ARGUMENT.

The order of this court granting the issuance of a writ of *certiorari* to review the determination of the Circuit Court of Appeals in this case limited the scope of the issues to be presented to the questions concerning the validity and effect of the waivers.

The Assessment-Only Waiver of February 5, 1921, Related Only to Income Taxes and Did Not Extend the Statutory Period for Collection Thereof.

The Income and War-Excess Tax Returns of this petitioner for the year 1917 were filed on March 30, 1918. On February 5, 1921, the petitioner signed and delivered to the Commissioner of Internal Revenue a so-called waiver (R. 40) which reads, as follows:

> WAIVER (Individual)
>
> "I, Friend M. Aiken, in consideration of the assurance given me by officials in the Income Tax Unit of the Bureau of Internal Revenue that my liability for all federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however. that I

do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

Friend M. Aiken,
By (Signed) E. F. Blaise,
Attorney-in-Fact Taxpayer.

"Approved, D. H. Blair, Commissioner of Internal Revenue, Date—November 29, 1922."

It will be noted that this alleged waiver relates only to the time within which assessments may be made. It does not expressly or inferentially undertake to extend the limitation period for making collection. A careful reading of this instrument, also, will disclose that no mention is made of the War-Excess Profits Tax Act of October 3, 1917. Subsequent to the date this alleged waiver was delivered to the respondent the Revenue Act of November 23, 1921, was approved, which was the first Revenue Act providing for or authorizing the Commissioner to entertain or receive waivers. Section 250 (d) of that Act provides, as follows:

"* * * The amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled, 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax * * *."

The above statutory limitation with respect to this petitioner, expired without waiver on March 30, 1923. The tax in this case was not assessed until March 12, 1925. It is thus apparent that the Commissioner relied on the waiver of February 5, 1921, though it was not accepted by him until November 29, 1922. At the time when this waiver was requested by the Commissioner and submitted by this petitioner, there was no statutory provision for waivers and the respondent was without authority to demand, accept or consider such waiver until the enactment of the Revenue Act of 1921, on November 23, 1921. The duties of the Commissioner of Internal Revenue are defined and limited by statute and when he acts without statutory authority such acts are void (*Joy Floral Company* v. *Commissioner,* 29 Fed. (2d) 865). The Revenue Act of 1918 which was in effect at the time the waiver was demanded by the Commissioner and submitted by the petitioner did not contain, inferentially or otherwise, an authorization for a contract, consent or waiver of an extension of the statute of limitations. The 1918 and prior Revenue Acts created a certain liability and limited such liability on point of time in no uncertain terms, making no provision whatsoever authorizing anyone to waive the periods of time therein provided or consent to an extension thereof. It is true that the Revenue Act of 1921 contained a provision authorizing the Commissioner to enter into an agreement with a taxpayer to extend the statute of limitations provided by law for the determination, assessment and collection of the tax. However, there is nothing in the 1921 Act which purports to authorize and

validate an agreement to an extension of the statute of limitations for assessment only which was entered into prior to the enactment of that statute.

The honorable court, in a long line of decisions dealing with the general subject of the power of an authorized officer to bind the government, has accepted the principle of law that an authorized officer of the Government is a creature of statutory law and may only contract and bind the government to the extent, in the manner and for the purposes specifically authorized by such law. *Hunter* v. *United States*, 5 Peters 173; *Pierce* v. *United States*, 7 Wall. 666; *Coler* v. *Cleburne*, 131 U. S. 162. Further, this court has held in *De Arnand* v. *United States*, 151 U. S. 488, that an officer of the government has no authority to waive the statutory limitation imposed upon suits against the United States. In *Anthony* v. *Jasper County*, 101 U. S. 693, the court stated that a government agent's authority depended upon the law in effect at the time he acted, and that he had only such powers as specifically granted by law. It follows, therefore, that the act of the respondent in demanding the waiver of February 5, 1921, was beyond the scope of his statutory authority and the waiver was void from its inception.

The petitioner contends that section 250 (d) of the Act of 1921, superseded the waiver of February 5, 1921. (*Toxaway Mills* v. *United States*, 61 Ct. Cl. 363.) The general rule is that a waiver extends only to rights existing when it is made. (*Pence* v. *Langdon*, 99 U. S. 578, and *Bennecke* v. *Insurance Company*, 105 U. S. 355.) This section of the

1921 Act very specifically provides that the Commissioner and a taxpayer may "consent in writing to a later determination, assessment and collection of the tax." A mere consent to the assessment will not suffice and certainly is not a compliance with the statute. We think this is a fair interpretation of the clause and the one which must be accepted. This honorable court in *United States* v. *Updike, et al.*, 281 U. S. 489, stated that the rule is that taxing acts, including provisions of limitation embodied therein, must be construed liberally in favor of the taxpayer. Following the rule of these cases it appears that a consent authorized by the Act of 1921, is one given after its enactment. With the passage of the Act of November 23, 1921, the respondent had a year and four months within which to assess and collect a tax or to obtain a waiver in conformity with the provisions of this act. He did neither the one nor the other.

After the Revenue Act of 1921 had been in operation for some two years, the respondent awoke to the fact that it contained a limitation provision for the assessment and collection of 1917 taxes. However, on April 11, 1923, he found that the bar of the statute of limitation on assessment and collection of all taxes for the year 1917 had fallen. Yet on that date he attempted to lift the bar by the promulgation of Mimeograph 3085, reading as follows:

> "The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the taxpayer. Inasmuch as there are many waivers on file signed by the taxpayers containing no limita-

tion as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924."

If it can be said that this ruling means anything at all, or has any force whatsoever, it must be confined to waivers executed after the date of the passage of the Revenue Act of 1921, and before the five-year period of limitations for the assessment and collection of taxes had expired. However, from its wording it attempts to deal only with assessment waivers, without limit, that were executed by taxpayers prior to the date of the passage of the Revenue Act of 1921. Therefore it contravenes the plain provision of that law, and is void *in toto*. The only effect this ruling can have, is an amendment to the provisions of section 250 (d) of the Revenue Act of 1921; and for it to have that effect, renders it utterly void. It is fallacious, as was the argument of the government in the *Bowers* case, and in effect the Supreme Court has adjudged it to be void.

If the waiver of February 5, 1921, can be said to have been alive, it must be held that it has the breath of life breathed into it by the Commisioner's *ex parte* ruling of April 11, 1923. There is no support for such a conclusion, and it would do violence to every known rule of statutory construction.

Instead of promulgating Mimeograph 3085, the Commissioner should have carried his troubles to Congress, which is the only body that can amend its own laws.

About the time the Commissioner discovered the necessity for the enlargement of the time for making assessment and collection of taxes for the year 1917, it was also discovered that there should be an enlargement of the time for making refunds under the provisions of section 252 of the Revenue Act of 1921, of taxes overpaid. On March 4, 1923 (42 Stat. 1504), Congress amended section 252 of the Revenue Act of 1921; and again on March 13, 1924 (43 Stat. 22), Congress amended section 252 of the Revenue Act of 1921.

It is true that Congress could have provided originally, in section 250 (d), or by subsequent amendment, that indefinite waivers of the limitation provision of the Revenue Act of 1917 would terminate on a definite date. But what was the necessity for such a specific provision when the limitation theretofore waived was enlarged from about March 15, 1921, to March 15, 1923? In the original draft of section 250 (d), Congress evidently thought such enlargement was ample; and if not, the taxpayer and the Commissioner, by written consent, could extend said time. It would have been unfair to the taxpayer for the Commissioner to have undertaken to obtain from Congress an amendment similar to the provisions of Mimeograph 3085. It is doubtful that he could have obtained such an amendment, and certainly he may not make it himself.

A statute of limitation in the case of the Revenue Laws is provided solely for the benefit of taxpayers. A taxpayer who has the right to plead and rely upon the bar of the limitations prescribed by Congress for his sole benefit may not

be defeated in that right by a ruling of the Commissioner that is clearly beyond the scope of his authority and has no support in law.

In *Toxaway Mills* v. *United States*, 61 Court of Claims 363, at page 370, the court said:

> "We think the plaintiff could waive a right given by the statute. See *Shutte* v. *Thompson*, 15 Wall. 151, 159, and that it did so when it executed the waiver. But it does not follow that the waiver, standing alone, should be given the effect of waiving the provisions of a subsequent statute. The general rule is that a waiver extends the rights existing when it is made. See *Pence* v. *Langdon*, 99 U. S. 578, 581; *Bennecke* v. *Insurance Co.*, 105 U. S. 355, 359. In this view a consent authorized by the Act of 1921 is one given after its enactment."

In *Pence* v. *Langdon*, 99 U. S. 578-582, it is said:

> "Acquiescence and waiver are always questions of fact. There can be neither without knowledge. * * * There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do."

In *Bennecke* v. *Connecticut Mutual Life Insurance Company*, 105 U. S. 355, at page 360, it is said:

> "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally but with knowledge of the circumstances. This is the rule where there is a direct and precise agreement to waive the stipulation. *A fortiori* is the rule when there is no agreement either verbal or in writing to waive the stipulation, but where it is sought to deduce a waiver

> from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding."

It appears that the Commissioner of Internal Revenue approved the waiver of February 5, 1921, on or about November 29, 1922. Between the dates of February 5, 1921, and November 29, 1922, the subject-matter of the waiver in existence as of February 5, 1921, *viz,* the limitation provisions of the Revenue Act of 1917, had been repealed and entirely new litigation provisions prescribed. The taxpayer was never requested to give a waiver of the new limitations, and the approval by the Commissioner on November 29, 1922, of the taxpayer's waiver of the provisions of the 1917 Act did not convert said waiver into a consent provided for in section 250 (d) of the Revenue Act of 1921. In fact, its terms do not cover a waiver of the limitations provided in section 250 (d). It is true, that at the time the Commissioner approved said waiver as of November 29, 1922, he had the authority to make an assessment of tax against the taxpayer for the year 1917; but he had no authority to make a waiver for the taxpayer that would deprive him of the benefit of the limitation provisions expressly provided for his benefit. The taxpayer may not be held responsible to the government for the non-action or misconduct of the Commissioner. The Commissioner was supposed to know that the waiver of February 5, 1921, had been superseded by the

provisions of section 250 (d). The taxpayer never knew that the Commissioner had attempted to change the arrangements provided for in said waiver, until long after the bar of the limitations, as prescribed by section 250 (d), was down. However, the taxpayer did know, and was bound to know, that the limitation for assessment in the Revenue Act of 1917, that he waived, had been repealed; and that section 250 (d) of the Revenue Act of 1921 provided that no assessment of taxes would or could be made against him without deliberate, intensive and thorough consideration by the Commissioner, and that all taxes due from him for the year 1927 would become barred of collection on April 1, 1923.

As an interpretation of section 250 (d) of the Revenue Act of 1921, Mimeograph 3085 flies in the face of the decision of this honorable court in the *Bowers* v. *New York and Albany Lighterage* case, *supra*, and must fall.

As an amendment to section 250 (d) of the Revenue Act of 1921, Mimeograph 3085 undertakes to provide that, where a waiver of the limitation provisions of section 9 of the Revenue Act of 1917 was given, the limitation provisions of section 250 (d) do not become operative, and that any time before April 1, 1924, any tax found to be due for the year 1917 could be assessed and collected as though the Revenue Act of 1921 had never been passed. That after the tax was assessed, if assessed before April 1, 1924, it could be collected by distraint proceedings at any time. In other words, the Commissioner holds that the taxpayers who executed waivers prior to November 23, 1921, had waived the

benefit of all future laws in regard to having their tax matters settled except as he might determine.

In *Bowers, Collector,* v. *New York and Albany Lighterage Company,* 273 U. S. 346, this court held that the government was barred from collection after the five-year period, even though assessment had been made during the authorized period. It follows, therefore, that although this court should hold that assessment was made under the authority granted by the assessment-only waiver which was unlimited as to time, the period for collection was limited to the statutory provisions and collection was barred after March 30, 1923. We want to urge that the alleged waiver of February 5, 1921, is not such a consent or agreement as is contemplated by section 250 (d) of the Revenue Act of 1921. The weight and consideration to be given the instrument is to be gathered from the language employed. The instrument relates only to assessment and since the language is clear and unambiguous we submit that it does not meet the requirements of section 250 (d) of the 1921 Act, which authorizes a consent to a later determination, assessment and collection of the tax. In this connection may we urge that this court in *Bowers* v. *New York and Albany Lighterage Company, supra,* and again in the *Benjamin Russell* case, 278 U. S. 181, has recognized that the power to assess and the power to collect are separate and distinct powers which are separately and independently provided for by law. This court in those cases held that the power to collect is not one of the incidents of the assessment. These cases, therefore, hold that a waiver of the statutory period for making the

assessment does not constitute a waiver of the statutory period for collection unless the waiver of the period for collection is expressly included.

Granting, for the purpose of this discussion, that the waiver of February 5, 1921, was a valid instrument to the extent of its express terms, it did not operate to extend the period of assessment and/or collection of the taxes imposed by the War-Excess Profits Tax Act of October 3, 1917. This waiver expressly states "* * * for all federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by Act of Congress, approved October 3, 1917, * * *." On October 3, 1917, an amendment to the Act of September 8, 1916, was approved. On the same date the War-Excess Profits Tax Act was approved. This latter act is in no sense an amendment to the Act of September 8, 1916. It is unreasonable to urge that the language quoted above from the waiver of February 5, 1921, includes taxes imposed by the War-Excess Profits Tax Act.

In this connection, we wish to call the court's attention to the fact that the form of the alleged waiver here under consideration is that form drawn and prepared by the Commissioner and furnished to the petitioner by that official. This fact alone should preclude constructions and interpretations of a strained or inferential character, particularly where the same tend to favor the Commissioner. The fair and reasonable import of the language used in the waiver form circumscribed its significance. An extension beyond this by interpretation or otherwise, is wholly unwarranted. The taxpayer's contention with respect to the interpreta-

tion to be given this waiver, if valid for any purpose, is fully sustained by the court in *Joy Floral Company* v. *Commissioner, supra*, and certainly cannot be interpreted in a manner to extend the statute of limitations for assessment of taxes imposed by the War-Excess Profits Tax Act of October 3, 1917.

This court has held in *Florsheim Brothers Dry Goods Company, Ltd., et al.*, v. *The United States*, 280 U. S. 453, that a waiver of the statute of limitations is nothing more than what it is termed on its face—waiver. This being true, the petitioner earnestly contends that the instrument of February 5, 1921, even if found to be valid for any purpose whatsoever, merely gave the Commissioner the right to assess a tax due under the taxing statute specifically mentioned in such instrument; that no right is thereby given to collect such tax in a manner and at a time not provided by the statute under which the tax is due and assessable and that the collection of such tax has been barred since April 1, 1923; that no right whatsoever is thereby given to assess and/or collect a tax due and assessable under the War-Excess Profits Tax Act of October 3, 1917, in a manner and at a time not provided by such act or by subsequent Revenue Acts and that the assessment and/or collection of such tax has been barred since April 1, 1923.

A Waiver Given After the Expiration of the Statutory Period for Assessment and Collection Is Invalid.

After the alleged assessment-only waiver of February 5, 1921, was filed and the Commissioner of Internal Revenue had promulgated Mimeograph 3085, nothing further to revive the statute of limitations was done until the assessment and collection waiver dated March 3, 1924, was demanded and filed (R. 41). This waiver purported to extend the statutory period for one year from the date it was signed, or the statutory period as extended by any waivers already on file with the Bureau of Internal Revenue.

The petitioner earnestly contends that the assessment and collection waiver filed on March 3, 1924, was filed after the statute of limitations had expired and on that account was null and void. The United States Court of Claims in the case of *Chas. H. Stange* v. *The United States*, decided November 4, 1929, held that there was no material difference between the provisions of the Revenue Act of 1921 and 1924, as the same related to the provisions for waivers of the periods of limitation. The Court of Appeals for the District of Columbia, in the case of *Joy Floral Company* v. *Commissioner*, 29 Fed. (2d) 865, had before it the question of the validity of a waiver given after the enactment of the Revenue Act of 1924. The court in that opinion stated:

> "When Congress enacted the Revenue Act of 1924, which also is applicable to this assessment, it added the proviso contained in section 278 (c), *supra*, to the effect that if both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the expiration of the time prescribed in section

277 for its assessment, the tax may be assessed at any time prior to the expiration of the extended period thus agreed upon. The question arises whether the words 'have consented to the assessment,' relate only to an agreement made prior to the expiration of the five-year period for the purpose of extending the period, or whether they relate also to an agreement made after such period has expired, for the purpose of reviving the Commissioner's authority to make an assessment after the bar of the statute has already intervened.

"The Board of Tax Appeals held that the consent thus filed after the lapse of the five-year period was valid and effective, and accordingly sustained the assessment. We are of the opinion, however, that the board erred in so ruling."

In *Spear & Company* v. *Heiner*, 34 Fed. (2d) 795, the District Court for the Western District of Pennsylvania held that a waiver executed after the statute has run to be effective, must be supported by a consideration and that the tax collected on the theory that the waiver was valid, was unlawful and plaintiff entitled to recover. The same question has been considered by other courts and in the following cases the waivers were held invalid:

Columbian Iron Works v. *Lee Brock, Collector*, (U. S. District Court for the Middle District of Tennessee, September 28, 1929);

Walsh v. *Price*, 34 Fed. (2d) 57;

Graylock Mills v. *The Commissioner*, 31 Fed. (2d) 655 (Circuit Court of Appeals for the 2nd Circuit);

Pictorial Printing Company v. *The Commissioner*, 38 Fed. (2d) 563.

In the last mentioned case *(Pictorial Printing Company)*, the Circuit Court stated:

"* * * Concededly the right to take proceedings for the determination, assessment, and collection of appellant's 1916 tax terminated February 28, 1922, and when a year and a half thereafter, the revenue officers appeared at appellant's place of business to investigate that return, there was no longer any right to institute any proceedings looking to the determination, levy or collection of any further tax for that year.

"When the revenue officer then presented the waiver or consent for signature, the taxpayer has no liability on account of the tax for 1916 * * *.

"But, apart from this, there is the question whether, in general, a statutory consent for determination of a tax, entered into after expiration of the period of limitation, upon proceedings for redetermination, assessment, or collection, has any validity.

"The Board of Tax Appeals held in its opinion in this case that such a consent was binding upon the taxpayer, and that a deficiency found thereunder was valid and collectable. Among others of the Board's opinions there was cited in support *Joy Floral Company*, 7 B. T. A. 800. It appears that upon review of that case by the Court of Appeals of the District of Columbia, that court reversed the decision of the Board, and held that such consent for extension was not effective if entered into after the period of limitation had expired. *Joy Floral Company* v. *Commissioner*, 29 F. (2d) 865. This decision was followed in *Spears & Company* v. *Heiner, Collector*, D. C. Pa., 34 F. (2d) 795; and by the District Court for the Middle District of Tennessee in *Columbia Iron Works* v. *Brock, Collector*, September 28, 1929. But in a more recent case, in the United States Court of Claims, *Stange* v. *United States*, November 4, 1929,

a decision was reached in conformity with the views of the Board of Tax Appeals in its *Joy Floral Company* decision.

"For the reasons stated in the said opinion of the Court of Appeals of the District of Columbia, and in the above cited cases in which it was followed, we are of the opinion that the correct rule was there announced, and that the Commissioner takes nothing by a consent first entered into after the limitation had expired."

A limited period for assessing and collecting taxes imposed a limitation upon the power of the administrative officers of the government. Those officers are creatures of the statute and after the expiration of the statutory period their acts are without legal effect and are therefore void. The subject-matter here involved is one relating to the exercise of a sovereign power of taxation, a matter charged with a public interest. This case is one wholly different from that which might arise on a limitation statute which is to be waived or invoked by one private citizen against another. If we assume the parties to be *sui juris,* then only private rights are involved and the statute of limitations or even laches may be waived at any time by the party sought to be charged. In that sort of case the public has no concern, no precedent is established which may affect the public in general, such as we have where there is a question of the revival of the power of a public officer, previously barred, to levy or collect a tax.

The petitioner concedes that the Constitution confers upon Congress the power to levy and collect taxes and that

the Congress may extend the period for the levy and collection of those taxes. However, that question is not involved in the consideration of this case. Here we are concerned with the question involving the proper construction of a taxing act; and the revival of a taxing power in the Commissioner of Internal Revenue such as is here contended for by the government must be evidenced by language that is susceptible of no other reasonable construction. We submit that the provisions of section 250 (d) of the Revenue Act of 1921 do not meet that test. Undoubtedly the government's position must be sustained by the provisions of the above mentioned section and by the alleged waiver which the respondent is contending was executed in conformity with that section.

The petitioner submits that the waiver of March 3, 1924, if valid at all, did not extend the period for collection beyond March 30, 1924. The five-year period provided by section 250 (d) of the Revenue Act of 1921, with respect to the 1917 returns filed on March 30, 1918, had expired on March 30, 1923. However, if this court should hold that the waiver was valid from the date filed, then by its terms it would expire on March 3, 1925, and the Commissioner has been without authority to assess and to collect the 1917 taxes since that date. Furthermore, if this court should hold that the waiver of March 3, 1924, was signed during the period of the alleged assessment-only waiver of February 5, 1921, the facts show that the said waiver of March 3, 1924, was signed after the period of collection of the taxes imposed by the Revenue Act of September 8, 1916, as amend-

ed on October 3, 1917, has expired. In our discussion of the first issue included in this brief it was pointed out that the alleged assessment-only waiver of February 5, 1921, made no reference whatsoever to the taxes assessable for the year 1917, under the provisions of the War-Excess Profits Tax Act of October 3, 1917. We also pointed out that since no reference was made to that act in the alleged assessment-only waiver of February 5, 1921, the periods of limitation for assessment and collection of the War-Excess Profits Taxes which might be determined to be due from this petitioner expired on March 30, 1923. The waiver of March 3, 1924, purported to waive and extend the statutes of limitation for assessment and collection of the War-Excess Profits Taxes but such waiver was demanded by the respondent and filed by the petitioner after the statute of limitations had run, and under authority of the *Joy Floral Company* and *Pictorial Printing Company* cases, *supra,* is void and of no effect for any purpose whatsoever. This position is also sustained by the *dictum* appearing in the *Graylock Mills* case, *supra.*

This petitioner earnestly contends that there is no provision in any of the revenue acts which authorizes the reinstatement of the statutory periods of limitation after such periods have run or expired. It also appears that a revival of such statutory periods has at no time been contemplated by the Congress. At least there is nothing in the various revenue acts which would suggest anything of this sort. The only reasonable construction which may be given the pertinent provisions of the Revenue Act of 1921, and subse-

quent revenue acts relating to extension of the periods of limitation undoubtedly contemplate a consent or agreement by the Commissioner and the taxpayer to a continuation or extension of a right that in fact exists at the time the consent or agreement is entered into or made.

For these reasons it is respectfully urged that the waiver filed with the Commissioner on March 3, 1924, and the waiver filed on February 16, 1925, (R. 39) did not revive or reinstate the statutory periods of limitation, either with respect to assessment or with respect to collection.

It is submitted that the assessment of the additional tax here involved was made at a time when there were no valid waivers on file and the waiver relied upon at the time the assessment was entered was void because it was executed and filed after the expiration of the statutory periods for assessment and collection. Especially does the petitioner again urge that the assessment and collection of the War-Excess Profits Taxes sought to be collected from this petitioner has been barred of both assessment and collection since March 30, 1923.

Conclusion.

The judgment of the Circuit Court of Appeals for the Eighth Circuit entered in this case should be reversed and the relief prayed for by the petitioner granted.

Respectfully submitted,

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L. E. CAHILL,
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Of Counsel.

APPENDIX.

The following provisions of law are pertinent to the consideration of this appeal:

REVENUE ACT OF 1913, SECTION E *(1)*.
REVENUE ACT OF 1916, SECTION 9-*a*.
REVENUE ACT OF 1917, SECTION 14-*a*.

"That all assessments shall be made by the Commissioner * * * and all persons shall be notified of the amount for which they are respectfully liable on or before the 1st day of June of each successive year * * * except in cases of refusal or neglect to make such return and in cases of erroneous, false, or fraudulent returns, in which cases the Commissioner * * * shall, upon the discovery thereof, at any time within three years after said return is due, or has been made, make a return upon the information obtained * * * and the assessment * * * thereon shall be paid * * * immediately upon notification of the amount of such assessment * * *."

REVENUE ACT OF 1918, SECTION 250-*d*.

"* * * The amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made * * *."

REVENUE ACT OF 1921, SECTION 250-*d*.
(42 Stats. 265-266.)

"The amount of * * * any * * * taxes due under this act for prior taxable years * * * shall be deter-

mined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment and collection of the tax; and no suit for the collection of any such taxes * * * shall be begun after the expiration of five years after the date when such return was filed * * *."

REVENUE ACT OF 1924, SECTION 277-*a*-2.
(43 Stats. 299-300.)

"The amount of * * * taxes imposed by the * * * Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

SECTION 278.

"*(c)* Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

"*(d)* Where the assessment * * * is made within the period prescribed in section 277 * * * such tax may be collected by distraint or by a proceeding in court * * * begun within six years after the assessment of the tax. Nothing in this act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"*(e)* This section shall not *(1)* authorize the assessment of a tax or the collection thereof by distraint

or by a proceeding in court if at the time of the enactment of this act such assessment, distraint or proceeding was barred by the period of limitation then in existence, or *(2)* affect any assessment made, or distraint or proceeding in court begun, before the enactment of this act."

REVENUE ACT OF 1926, SECTION 277 *(a)*.
(44 Stat. 58-59.)

Section 277 *(a)*, except as provided in section 278:

"*(3)* The amount of income, excess profits, and war profits taxes imposed by the act entitled, 'An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the act entitled, 'An act to reduce tariff duties and to provide revenue for the government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

"* * * Sec. 278 *(c)*. Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

SECTION 1106 *(a)*.

"The bar of the statute of limitations against the United States in respect of any internal revenue tax shall not only operate to bar the remedy, but shall extinguish the liability * * *."

[APPENDIX]

REVENUE ACT OF 1928, SECTION 276-*b*.

"*Waivers.* Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreement in writing made before the expiration of the period previously agreed upon."

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In the Supreme Court of the United States

OCTOBER TERM, 1929

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, PETITIONER

v.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the granting of the writ in this case.

The petition for certiorari presents two questions which are now before this Court in *Charles H. Stange* v. *The United States,* No. 554, October Term, 1929, writ of certiorari granted March 3, 1930.

The first question is whether a "consent in writing" waiving the period of limitations for the collection of taxes is valid and effective within the

meaning of Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, when executed after the period of limitations had already expired. In the *Stange case* the "consent in writing" waived the period of limitations for the assessment of taxes. The question is the same whether the "consent in writing" waives the period of limitations for assessment or collection or for both. In the present case the statutory period within which collection could be made, of taxes due for 1917, would have expired March 30, 1923, five years after the return was filed. A consent in writing was executed and filed on March 3, 1924 (R. 31), extending the period for assessment and collection to April 1, 1925. The effectiveness of that consent to extend the period for collection is in question.

The second question is whether a waiver extending the statutory period for assessment empowers the Commissioner of Internal Revenue not only to assess but also to collect the taxes after the expiration of the statutory period. The petitioner filed his 1917 income tax return on March 30, 1918. (R. 38.) On February 7, 1921, he filed a waiver extending indefinitely the period within which assessment of taxes could be made. (R. 38.) The Commissioner of Internal Revenue promulgated, on April 11, 1923, Mimeograph 3085, Internal Revenue Bulletin C. B. II–1, January–June, 1923, p. 174, announcing that unlimited waivers would be held to expire April 1, 1924. On March 3, 1924, petitioner, as stated in the preceding paragraph, executed and filed a consent in writing extending

the period for both assessment and collection to April 1, 1925. (R. 31.) On March 12, 1925, the Commissioner of Internal Revenue made a jeopardy assessment of taxes found due. (R. 27.) The assessment was valid, since it was made within the statutory period as extended by waivers. Each waiver was filed within the statutory period or the statutory period as extended by waivers already on file in the Bureau. The question is whether these waivers, which conferred upon the Commissioner of Internal Revenue the power to make assessments after the expiration of the statutory period, also empowered him to collect the tax after the expiration of the statutory period.

As to the other questions raised in the petition for certiorari, we submit that the decision of the Circuit Court of Appeals was correct, and that there is no conflict of authority. We suggest that the Court limit its review to the first two questions.

Respectfully submitted.

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APRIL, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1930

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Preliminary discussion	6
Summary of argument	7
Argument	8
Conclusion	12
Appendix (statutes involved)	13–16

CITATIONS

Cases:

Bank v. *Kimble*, 76 Ind. 195	8
Florsheim Bros. Co. v. *United States*, 280 U. S. 453	10
Parchen v. *Chessman*, 49 Mont. 326	8
Russell v. *United States*, 278 U. S. 177	7
Sanger v. *Nightingale*, 122 U. S. 176	8
Stange v. *United States*, 68 C. Cls. 395; No. 23, October Term, 1930	10

Statutes:

Revenue act of 1921, c. 136, section 250 (d), 42 Stat. 227, Section 278 (e) 265	13
Revenue act of 1924, c. 234, section 278 (d) 43 Stat. 253, 299, 300	14
Revenue act of 1926, c. 27, section 278 (c) 44 Stat. 9, 58, 59	14
Revenue act of 1928, c. 852, section 506, 45 Stat. 791, 870	15

In the Supreme Court of the United States

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No. 69

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF Friend M. Aiken, Deceased, petitioner

v.

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 46–50) is reported in 10 B. T. A. 553, and the opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 71–79) sustaining the determination of the Board is reported in 35 F. (2d) 620.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Eighth Circuit was entered October 28, 1929. (R. 79.) A petition for rehearing was filed December 21, 1929, and denied

January 9, 1930. (R. 80.) The petition for the writ of certiorari was filed March 31, 1930 (R. 82), and was granted, with limitations, on May 5, 1930 (R. 81), 281 U. S. 713. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a waiver of the statutory period of limitation for assessment of taxes for 1917 was valid, although executed prior to the enactment of Section 250 (d) of the Revenue Act of 1921, which contained the first statutory provision for such waivers.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra,* pages 13–16.

STATEMENT

The order of this Court granting the writ of certiorari in this cause limited the briefs and argument to "questions concerning the validity and effect of the waivers." In the petition for certiorari the petitioner abandons all issues relating to the year 1918 (p. 6). Therefore, in this brief the respondent will discuss only the validity and effect of the waivers as affecting the assessment and collection of taxes for the year 1917.

The taxpayer filed an income and profits tax return for the year 1917 on March 30, 1918. (R. 40.) On February 5, 1921, he executed the following instrument:

Waiver (*Individual*)

I, Friend M. Aiken, in consideration of the assurance given me by officials in the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate intensive, and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

FRIEND M. AIKEN,
Taxpayer.

(Signed) By E. F. BLAISE,
Attorney-in-Fact.

This instrument was filed by the taxpayer on February 7, 1921 (R. 41), and was approved by the Commissioner of Internal Revenue on November 29, 1922 (R. 41). This waiver expired on April 1, 1924, under a ruling promulgated by the Commissioner of Internal Revenue on April 11, 1923, and known as Mimeograph 3085 (C. B. II–1, p. 174), reading in part as follows:

> Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924.

On November 23, 1921, the Revenue Act of 1921 was enacted. Section 250(d), *infra*, p. 13, provided that taxes for 1917 be assessed within five years after the return was filed. In the instant case this five-year period expired on March 30, 1923.

On March 3, 1924, the taxpayer executed the following instrument, which was thereafter accepted and executed by the Commissioner of Internal Revenue (R. 41):

> MARCH 3, 1924.
>
> INCOME AND PROFITS TAX WAIVER
>
> In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August

5, 1909. This waiver is in effect from the date it is signed by the taxpayer, and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

(Signed) FRIEND M. AIKEN,
Taxpayer.

(Signed) By D. H. BLAIR,
Commissioner.

On March 12, 1925, the Commissioner made a jeopardy assessment against the taxpayer for the year 1917 in the amount of $70,740.88. (R. 43.) Within ten days after the date of this assessment the taxpayer filed with the collector a claim in abatement. (R. 43.)

On October 7, 1926, the Commissioner advised the taxpayer of a determination on his claim for abatement of his tax liability for the year 1917, disclosing an overassessment of $19,126.79. (R. 44.) This reduced the jeopardy assessment by that amount and resulted in a deficiency of $51,614.09.

From this determination the taxpayer appealed to the Board of Tax Appeals on November 25, 1926. (R. 45.) The Board decided against the taxpayer. (R. 38.) The Circuit Court of Appeals for the Eighth Circuit affirmed the decision of the Board. (R. 71.)

Assessment of the taxpayer's 1917 taxes would have been barred on March 30, 1923, five years from the date of the return, had not the period for assessment been extended by the first waiver, executed on February 5, 1921. (R. 40). This waiver, though unlimited in its language, expired on April 1, 1924, under a ruling of the Commissioner. If this first waiver was valid and applicable, the time for assessment had not expired when a second waiver was executed on March 3, 1924. (R. 41.) This second waiver by its express terms was to remain in effect "for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made * * *." Consequently, this waiver expired on April 1, 1925, if the first waiver was valid, and extended the period for assessment until after the time when the jeopardy assessment was made, March 12, 1925. If the first waiver was invalid, the second waiver expired on March 30, 1924, and does not cover the assessment.

If the jeopardy assessment of March 12, 1925, was valid, the tax may still be collected. The waiver of March 3, 1924, extended the time for collection, we contend, to April 1, 1925. On June 2, 1924, the Revenue Act of 1924 was passed. Section 278 (d) provided that where the assessment of any tax is made within the period prescribed, collection

may be made within six years after the assessment. Section 278 (e) has no application, as the period for collection was not barred and the assessment had not been made at the time of the passage of the Act. Cf. *Russell* v. *United States,* 278 U. S. 177. The existing law allows collection within six years after the assessment. Section 278 (d) of the Revenue Act of 1926, as amended by Section 506 of the Revenue Act of 1928. (*Infra,* pp. 14–15.)

The only question in the instant case involves the effect of the waivers dated February 5, 1921, and March 3, 1924, in extending the period for assessment. By its order of May 5, 1930, 281 U. S. 713, this Court limited the argument in this case to "the questions concerning the validity and effect of the waivers." (R. 82.)

SUMMARY OF ARGUMENT

The first waiver of February 5, 1921, was valid although executed prior to the enactment of Section 250 (d) of the Revenue Act of 1921, which contained the first statutory provision for such waivers. This section defined and perhaps slightly restricted the common-law right to waive the statute of limitations. The waiver was a valid exercise of this common-law right. Its terms are broad enough to include the taxes here in question and to apply to limitations which might be imposed by future statutes.

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ARGUMENT

The taxpayer's return for the year 1917 was filed March 30, 1918. Under date of February 5, 1921, the taxpayer executed a waiver of all statutory limitations on the time for assessment of the 1917 taxes. The taxpayer obviously intended to extend by this general waiver the period for the assessment of the 1917 tax.

There is no weight to the contention that this waiver is invalid because executed prior to the enactment of the Revenue Act of 1921, which first provided for waivers. It may be true, as the petitioner contends, that the language of Section 250 (d) of that Act refers to consents given after the enactment of the Act. But this first waiver is valid apart from statutory authorization for assesment waivers. It can not seriously be disputed that anyone has the common-law right to waive any statute of limitations enacted for his benefit. Any beneficiary under such a statute could avail himself of it or waive it. *Sanger* v. *Nightingale*, 122 U. S. 176; *Bank* v. *Kimble*, 76 Ind. 195; *Parchen* v. *Chessman*, 49 Mont. 326. The plea of the statute of limitations is a personal privilege which may be availed of or not, as the beneficiary chooses. *Sanger* v. *Nightingale, supra.*

There is nothing in Section 250 (d) of the Revenue Act of 1921 to indicate that Congress intended to create a new right of waiver of the bar of the statute of limitations. It merely defines and slightly restricts existing rights. It provides that

the amount of income, excess-profits, or war-profits taxes due under any return made under any prior Acts shall be determined and assessed within five years after the return was filed—

> unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.

This language used is not reasonably susceptible of the interpretation that Congress was conferring upon either the taxpayer or the Commissioner of Internal Revenue any new authority. Certainly an Act of Congress was not necessary to permit a taxpayer to waive a statute of limitations and pay to his sovereign a tax justly and morally due. The better reasoning supports the contention advanced here by the Government that Congress, in the enactment of Section 250 (d) of the Revenue Act of 1921, intended only to sanction and define by statute the application of common-law principles of waivers. Under common-law principles there was no requirement that the Commissioner of Internal Revenue consent to the waiver, and the approval of the Commissioner on November 29, 1922, of the first waiver in the instant case was not needed. That this approval was made after the enactment of the Revenue Act of 1921 is of no significance. All that was necessary to constitute a valid waiver was that the taxpayer waive the statute of limitations. Such waiver was not necessarily required to be in writing but might have been oral. Section 250 (d) first specified the form required for a valid waiver and

made the written consent of the Commissioner of Internal Revenue a vital factor. See *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466–467.

The language of the Court of Claims in the case of *Stange* v. *United States,* 68 C. Cls. 395, now before this Court on a writ of certiorari (Docket No. 23) appears to construe the language used by Congress in a reasonable and logical manner. The court said, in part (p. 412):

> In the absence of a statutory provision either before or after the running of the statute of limitations, the taxpayer could, by a mere oral statement, waive the running of the statute. * * * The reason for having the commissioner sign the waiver had, in our opinion, nothing to do with its validity. * * * Congress did not intend that the Government should be bound in any way by the acceptance of waivers made by numerous collectors and revenue agents scattered all over the country but only in case the agreement was signed by the Commissioner of Internal Revenue. It was necessary for the orderly conduct of the Government's business that the commissioner should have full knowledge of the action taken. In this we find abundant reason for the requirement of the signature of the officer and, as we think, the only reason why it was required.

The petitioner, on page 15 of her brief, contends that the waiver of February 5, 1921, if valid, did not operate to extend the time for assessment of

war-profits taxes, but only of income taxes. She asserts that the language of the waiver, "all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917," does not refer to profits taxes. But the only statute approved on October 3, 1917, was Chapter 63, "An Act To provide revenue to defray war expenses, and for other purposes." This Revenue Act of 1917 was a separate Act from the Revenue Act of 1916, but a part of it, Title XII of the 1917 Act, consists of many amendments to that Act of September 8, 1916. It seems clear that the waiver covered profits taxes as well as income taxes.

The petitioner also argues that the waiver was not intended to waive limitations under subsequent statutes. The waiver was, by its express language, of "any and all statutory limitations" upon assessment of 1917 taxes. At the time of the execution of the waiver, the 1917 taxes had not been assessed and the Revenue Act of 1921 was soon to be enacted. We submit that the waiver was intended to cover an assessment to be made under future statutory provisions and that its language is indicative of this purpose.

Before the expiration of this first waiver on April 1, 1924, a second waiver was executed extending the period for assessment until April 1, 1925. Before the expiration of the period for assessment as extended by this second waiver, a jeopardy assessment was made on March 12, 1925. This

assessment was made "within the period of limitation properly applicable thereto," and under Section 278 (d) of the Revenue Act of 1926, as amended by Section 506 of the Revenue Act of 1928, *infra*, pages 15–16, collection may be had within six years after the assessment. Consequently collection is not barred until March 12, 1931, six years from the date of the jeopardy assessment.

CONCLUSION

It is respectfully submitted that the decision of the court below is correct and should be affirmed.

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Attorneys.

NOVEMBER, 1930.

APPENDIX

STATUTES INVOLVED

Section 250 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part:

> SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

Section 278 (d) and (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, provides:

> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.) (*Russell* v. *United States*, 278 U. S. 181.)

Section 278 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59, provides:

> Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

Section 506 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870, provides, in part:

> SEC. 506. *Waivers after expiration of period of limitation.*—(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:
>
> * * * * *
>
> "(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."
>
> (b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:
>
> "(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms

if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

No. 69.—October Term, 1930.

Annette Aiken, Administratrix of the Estate of Friend M. Aiken, Deceased, Petitioner, *vs.* David Burnet, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 5, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

On March 30, 1918, Aiken filed his return of income and excess profits taxes for the year 1917. On March 12, 1925, the Commissioner made a jeopardy assessment which, upon a claim for abatement, he reduced, on October 7, 1926. Aiken thereupon appealed to the Board of Tax Appeals on the grounds that the jeopardy assessment had been erroneously computed, and that both assessment and collection were barred by the statute of limitations. The Commissioner's determination was affirmed by the Board, 10 B. T. A. 553; and its decision was affirmed by the Circuit Court of Appeals for the Eighth Circuit, 35 F. (2d) 620. This Court granted a petition for certiorari, the argument to be "limited to the questions concerning the validity and effect of the waivers," 281 U. S. 713.

The Revenue Act of November 23, 1921, c. 136, § 250 (d), 42 Stat. 227, 265, provides a five-year period of limitation for the assessment and collection of income and excess profits taxes under earlier revenue acts. The five years from the filing of the return expired March 30, 1923. In order to sustain the validity of the assessment and the right of collection, it was necessary to establish a waiver effective March 12, 1925, the date of the jeopardy assessment. Several waivers had been given. The first, which was executed by the taxpayer on February 5, 1921, and filed with the Bureau two days later, was not executed by the Commissioner until after the enactment of the 1921 Revenue Act. That waiver expired

April 1, 1924.[1] Before that date, a second waiver had been duly executed, which, by its terms, was to remain in effect for "one year after the expiration of . . . the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made. . . ." Thus the jeopardy assessment was made shortly before April 1, 1925, the expiration period of the first waiver as extended by the second; and in order that this tax may be collected, both waivers must be valid.

First. It is contended that the waiver of February 5, 1921, is invalid because it was executed prior to the enactment of § 250 (d) of the Revenue Act of 1921 which was the first of the revenue acts to provide in terms for the giving of waivers. The argument is that prior to the enactment of that section the Commissioner lacked authority to accept waivers of the limitation on the period within which assessment might be made under the Acts of 1916 and 1917.[2] This contention is not sound. The limitation periods on assessment could be waived by the taxpayer in the same fashion as other statutes of limitations are waived. No reason appears why the Commissioner could not accept such a waiver prior to the Act of 1921. Although the Government might at that time still have brought suit even though the period for assessment had expired, it was thought desirable to follow the normal and simpler course of assessment and collection by distraint proceedings because of the advantages afforded.[3] The Commissioner requested the tax-

[1]It was unlimited in time, but expired under a departmental ruling, promulgated April 11, 1923, by which all such waivers were to terminate April 1, 1924. Mim. 3085, I. R. Cum. Bull. II-1, p. 174.

[2]Section 9 (a) of the Act of September 8, 1916, c. 463, 39 Stat. 756, 763, provided that where a false [erroneous] return had been filed, the Commissioner had three years in which to discover the error and to make an additional assessment. Section 3 of the Act of October 3, 1917, c. 63, 40 Stat. 300, 301, incorporated these provisions by reference. Compare, as to the 1909 and 1913 Acts, Elliot National Bank *v.* Gill, 218 Fed. 600; National Bank of Commerce *v.* Allen, 223 Fed. 472; Woods *v.* Lewellyn, 252 Fed. 106; and see Reg. 33 (1914) Arts. 25, 177; *id.* (Rev. ed. 1918) Arts. 38, 233; Brown & Sons Lumber Co. *v.* Burnet, No. 115, decided this day, note 2.

[3]Compare Article 233 of Regulations 33 (Rev. ed. 1918) which stated in this connection: "While the Government is fully authorized to recover such taxes by suit, it is desirable, in order to obviate needless expense and annoyance to the taxpayer and the Government, that the collection be made as a result of a formal assessment." See also *id.*, Art. 38.

payer to execute a waiver in cases where prolonged reëxamination of the return seemed necessary. If authority was needed for the acceptance of such waivers, it may be found in the general broad administrative provisions of the respective acts.[4] Even after the Act of 1921, a so-called waiver was not a contract. The requirement in § 250 (d) of that Act that the Commissioner sign the consent was inserted to meet exigencies of administration, and not as a grant of authority to contract for waivers. See *Stange* v. *United States,* No. 23, decided this day; *Florsheim Bros.* v. *United States,* 280 U. S. 453, 466.

Second. It is contended that the first waiver should not be construed as waiving a limitation prescribed by a statute thereafter enacted. The argument is that § 250 (d) of the Act of 1921 superseded this waiver and required a new consent executed subsequent to its enactment and in accordance with its terms. While § 250 (d) first specified that a waiver be in writing and signed by the Commissioner, there was nothing in that section which invalidated waivers made prior to its enactment or limited the effect of such instruments on the limitations therein imposed. Compare *Florsheim Bros.* v. *United States,* 280 U. S. 453, 467. The first waiver, by its express terms, embraced "any and all statutory limitations" upon the assessment of these 1917 taxes. We see no reason for restricting this language so as to exclude the limitations subsequently imposed by § 250 (d) of the Act of 1921.

Third. It is contended that the first waiver, even if valid, did not operate to extend the period for the assessment of war-profits as distinguished from income taxes. The argument is based on the reference in the waiver, which was prepared by the Commissioner, to "all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress,

[4]Revenue Act of October 3, 1917, c. 63, 40 Stat. 300, 325, § 1001, provides: "That . . . every person . . . liable to any tax imposed by this Act, or for the collection thereof . . . shall comply with such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may from time to time prescribe." This was followed by § 1309 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1143, which authorized "all needful rules and regulations for the enforcement of the provisions of this Act." Compare Revenue Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002, § 207.

approved October 3, 1917," and it is contended that the war-profits tax was a separate enactment, not an amendment to the 1916 Act, and hence not included within the waiver. It is clear that this waiver was intended to embrace all liability under the 1917 return then pending. Moreover, the only statute approved October 3, 1917, was the Revenue Act of that year, Chapter 63, the general object of which was to increase for war purposes the taxes levied by the Act of 1916.

Fourth. The petitioner has argued also that the first waiver did not purport to extend the time for collection. This waiver is identical with that before us in *Stange* v. *United States,* No. 23, decided this day, which we held was intended to embrace all the steps necessary for the ultimate collection of the tax. The second waiver expressly included "determination, assessment, and collection." Consequently, as the assessment of March 12, 1925, was timely, the right of collection is within § 278 (d) and § 280 of the Revenue Act of 1924, c. 234, Tit. II., 43 Stat. 253, 300, 301, which gives six years from the making of the assessment. *Florsheim Bros.* v. *United States,* 280 U. S. 453, 467. Compare *Russell* v. *United States,* 278 U. S. 181.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.